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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-710

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - **Petitioners**

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST - - - - - **Respondents**

AND

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY and BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - **Petitioners**

versus

JOHN E. HAYCRAFT and HAZEL K. LANE - - - - - **Respondents**

L. J. HOLLENBACH, III, County Judge - **Intervenor**

(Other parties respondent on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County and Board of Education of Louisville versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Board of Education of Jefferson County, Kentucky, and its Superintendent, Ernest Grayson, respectfully pray that a writ of certiorari issue to review the decision rendered in this case on August 23, 1976, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The original Memorandum Opinions and Judgments in these consolidated desegregation actions of the District Court were reversed and remanded for further proceedings by the United States Court of Appeals for the Sixth Circuit in *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973). This Court granted this petitioner's request for a writ of certiorari from that decision and reversed and remanded in light of *Milliken* v. *Bradley*, 418 U. S. 717 (1974). *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vacated* 418 U. S. 918 (1974).

On remand the Court of Appeals distinguished *Milliken* and reinstated its previous decision with modifications. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974). This Court subsequently denied review of that decision of the Court of Appeals. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974), *cert. den.*, 421 U. S. 931 (1975).

On July 17, 1975, the Court of Appeals issued a Writ of Mandamus to the District Court directing the full implementation of a plan of desegregation beginning with the school year 1975-76. *Newburg Area Council* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975).

The District Court issued its Desegregation Order pursuant to the Mandamus of the Court of Appeals on July 30, 1975. This Order is contained in part in the

separate Appendix to this petition. (Appendix, pp. 50-90). On August 2, 1976, the District Court amended its Desegregation Order to require, *inter alia*, the busing of an additional nine hundred black children each year in an attempt to bring twenty-eight elementary schools within the racial quotas set in the original Desegregation Order. The Amended Desegregation Order of August 2, 1976, is presently on appeal in the Court of Appeals by the petitioner here, the Board of Jefferson County, Ky. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed*, No. 76-2301, 6th Cir., Sept. 30, 1976. This Amended Desegregation Order is contained in the separate Appendix to this petition (Appendix, pp. 94-108).

The Court of Appeals on appeal from the original Desegregation Order of the District Court of July 30, 1975 affirmed that Order. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, Nos. 75-2032, 75-2188, 76-1413, 76-1414, 6th Cir., Aug. 23, 1976. This unreported decision of the Court of Appeals is the one to which this petition for writ of certiorari is directed. It is contained in the separate Appendix to this petition (Appendix, pp. 109-123).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 23, 1976. This petition for writ of certiorari was filed within ninety days of that Judgment. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF QUESTIONS PRESENTED

I. Did the District Court Abuse its Discretion in Rejecting a Plan of Desegregation in Which No School Would Have a Pupil Racial Composition of Less Than 10 Per Cent or More Than 50 Per Cent Black Pupils in a School System Whose Pupil Racial Composition is 20 Per Cent Black?

II. Where a Plan of Desegregation Imposed by a District Court Requires That 80 Per Cent of All Schools Operated by a School District With an Enrollment in Excess of One Hundred Thousand Pupils Maintain Pupil Racial Quota Which Deviate From the Pupil Racial Composition of the District by Only 5 Per Cent or Less, Does Such a Plan Impermissibly Raise Racial Balance to the Level of a Substantive Constitutional Right?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision relevant to the issues in this case is Amendment XIV, Sec. 1, United States Constitution:

> ". . . nor shall any such state . . . deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

These consolidated desegregation class actions, *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Ky.*, No. 7045 (W.D. Ky.) and *Haycraft* v. *Board of Education of Louisville, Ky.*, No. 7291 (W.D. Ky.) were filed on August 27, 1971, and June 22, 1972, respectively. The District Court held separate trials on the question of whether or not the two school systems were unitary and on March 8, 1973, entered its Memorandum Opinion and Judgment in each case dismissing the Complaints filed therein. The District Court in dismissing these complaints noted that a fairly typical pattern of metropolitan racial isolation did in fact exist in the Louisville-Jefferson County Metropolitan Area. The District Court commended the defendant school systems for their early attempts to desegregate their schools after this Court's landmark decision in *Brown* v. *Board of Education Topeka I*, 347 U. S. 483 (1954). At the time of the original decision of the District Court, the defendant school systems, Board of Education of Jefferson County, Ky. and Board of Education of Louisville, Ky., operated separate and distinct school systems under the law of the Commonwealth of Kentucky. At such time, the County system which encompassed primarily the suburbs surrounding Louisville, Kentucky had a pupil racial composition of 4 per cent black pupils. The Urban City System was roughly contiguous with the corporate boundaries of the City of Louisville, Kentucky and had a pupil racial composition of approximately 48 per cent black. The vast majority of the black pupils in Jefferson County,

Kentucky were isolated by housing patterns in the northwest quadrant of Jefferson County, Kentucky.

The Court of Appeals consolidated these actions for the purposes of appeal by the original plaintiffs from the decisions of the District Court of March 8, 1973. On December 28, 1973, the Court of Appeals entered its original decision in this matter. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973). The Court of Appeals reversed the judgments of the District Court and remanded the case for the formulation of a desegregation plan.

> "By whatever means the district court deems appropriate in the exercise of its equity powers. . . . all vestiges of state-imposed segregation must be eliminated within each school district in the county. To accomplish such purpose, state-created school district lines shall impose no barrier. We do not require use of any particular method nor approve in advance the use of any particular device. Any plan of desegregation is to be effective for the 1974-75 academic year." *Newburg, supra,* 489 F. 2d 925, 932.

The Court of Appeals held with respect to the County School System that it could not have been fully converted to a unitary system after *Brown I* where 56 per cent of all its black elementary school students attended three of 74 elementary schools. A similar finding was made with respect to the Louisville City system where the Court found that 80 per cent of its schools were racially identifiable. *Newburg, supra,* 489 F. 925, 929-930.

On July 25, 1974, this Court granted petitions of certiorari filed by all three school districts involved at that time in the litigation and vacated the Court of Appeals decision of December 28, 1973 for reconsideration in light of the concurrent decision in *Milliken* v. *Bradley, supra, Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vacated* 418 U.S. 918 (1974).

On remand, the Court of Appeals distinguished *Milliken* v. *Bradley, supra,* from the case at bar and reinstated its judgment of December 28, 1973 with minor modifications. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974). The Court of Appeals on remand determined *ab initio* that this Court's decision in *Milliken* in no respect required a reconsideration of the original determination of that Court that the City and County systems were impermissibly segregated as a matter of law. *Newburg, supra,* 510 F. 2d 1358, 1359. The Court of Appeals also directed certain procedural requirements with respect to reconsideration and implementation by the District Court. *Newburg, supra,* 510 F. 2d 1358, 1361.

On January 30, 1975, the District Court directed the City and County school systems to exercise their affirmative duty to come forward with a constitutionally acceptable desegregation plan. On March 31, 1975, the District Court entered its order maintaining separately, for the purposes of this litigation only, the legal entities of the Board of Education of Jefferson County, Ky. and the Board of Education of Louisville,

Ky., as constituted on such date, even though on April 1, 1975 the Board of Education of Louisville, Ky. lost its legal identity through merger with the parent school system, Board of Education of Jefferson County, Ky. The District Court's order of March 31, 1975 (Appendix, pp. 1-3) directed the sequential filing of desegregation plans by the former school systems beginning April 30, 1975.

The Board of Education of Jefferson County, Ky. on April 30, 1975 filed a proposed plan of desegregation known as the JET Plan (an acronym for Jefferson Educational Trip) pursuant to the District Court's order of January 30, 1975 directing the filing of such plan. The Board of Education of Louisville, Ky. filed its own plan of desegregation, "Revised Plan X," on May 20, 1975. After a full pre-trial conference on June 19, 1975, counsel for plaintiffs filed a Petition for Writ of Mandamus in the Court of Appeals in an attempt to compel the District Court to implement the pupil assignment aspects of a desegregation plan for the 1975-76 school year. On July 17, 1975, the Court of Appeals issued a Writ of Mandamus compelling the District Court to order the implementation of a plan of desegregation for the 1975-76 school year. *Newbury Area Council* v. *Gordon, supra.*

On the same day the mandamus was issued to the District Court, the Board of Education of Jefferson County, Ky. discussed with the District Court and the parties a supplement to the JET Plan which it proposed to file eliminating the "part time" aspect of such plan. The District Court, however, rejected both the

JET Plan, as so supplemented, and the Louisville System's Revised Plan X at such time. The Supplement to the JET Plan was not actually filed in the District Court until July 30, 1975. Both the JET Plan and the Supplement are contained in the separate Appendix to this petition. (Appendix, pp. 4-43; 43-50)

The JET Plan relied primarily on two tools to effect the transition to a unitary school system. The first such tool was to substantially redistrict the former Louisville School System which in many instances did not previously have individual school attendance zones due to a widespread use of a voluntary transfer plan which had been in effect in that school system for some time. Whenever possible individual school attendance zones were drawn so as to effect the maximum amount of desegregation of the student body for each school. The second method used by the JET Plan for desegregation of the two school systems was the clustering of several formerly predominantly white schools with a formerly predominantly black school with subsequent reassignment of many of the pupils in the cluster. Utilizing these two tools the JET Plan was designed to insure that no school in the school system would have a student racial composition of less than 10 per cent nor more than 50 per cent black pupils. The implementation of this plan would have involved the busing of in the neighborhood of 12 to 14 thousand pupils.

In light of the almost impossible task of preparing and implementing a plan of desegregation for a school system of in excess of 110,000 students in less than 60 days precipitated by the Mandamus of the Court of

Appeals directed to the District Court the parties at the request of the District Court and specifically in light of his rejection of both the JET Plan, as supplemented, and Revised Plan X, entered into an "Advice to the Court," waiving their right to a hearing on the propriety of the two desegregation plans tendered by the defendant school systems. (Appendix, pp. 90-91) In light of the fact that the District Court never held an evidentiary hearing on the proposed plans of desegregation submitted by the defendant school systems, this Court has no record to aid it in determining the propriety of the desegregation order ultimately adopted by the District Court. Certain actions by the District Court after the adoption of its original desegregation order of July 30, 1975, such as the District Court's amended Desegregation Order of August 2, 1976 (Appendix, pp. 94-108), while involving separate issues not directly in question here, do shed considerable light on the question of the propriety of the original desegregation order itself.

The original desegregation order of the District Court of July 30, 1975, is contained in substantial part in the separate Appendix to this petition. (Appendix, pp. 50-90) As in the JET Plan, the District Court's desegregation plan of July 30, 1975, relies on two primary tools for desegregation of the Jefferson County School System. The District Court adopted without any substantial revision the redrawn individual school attendance zones proposed in the JET Plan. Where the two plans diverge however is in the required degree of

racial balance in the individual schools within the system.

The District Court's desegregation plan of July 30, 1975 ostensibly sets as "guidelines" racial compositions of from 12 to 40 per cent black in the elementary schools and 12½ to 35 per cent black in the middle schools and high schools. The JET Plan increases this range from 10 per cent black to 50 per cent black. While the District Court's desegregation plan of July 30, 1975 denominates the two specific ranges of acceptable racial ratios mentioned hereinabove, in actual practice it sets specific racial compositions for every school in the school system. The picture resulting from a review of the actual racial quota set for each school by the District Court's plan of July 30, 1975 reveals that fully 60 per cent of the schools in grade groupings to which the Court directed its attention vary from the racial composition of the school system (20 per cent black) by three per cent or less and 80 per cent of that group vary from the "norm" by five per cent or less. For the convenience of the Court, a table has been appended to this petition which reveals the racial ratios in the individual schools set by the District Court's desegregation order of July 30, 1975 by percentages.

The tabular material found in the Addendum at the end of this petition compiles for the convenience of the Court information found at two separate points in the District Court's desegregation order of July 30, 1975. The table lists all schools (or separate portions of schools when such schools are so treated by the Desegregation Order of July 30, 1975) by the pupil racial com-

position specifically required for each such school or grade grouping by the District Court's desegregation plan. Schools exempted by such Plan from its transportation reassignment provisions are noted by an asterisk (*). Due to a lack of a uniform graded structure within the newly merged system (which has been partially rectified as of this writing) many schools have had imposed by the desegregation plan of July 30, 1975 different racial ratios for grades within a single building.

There are 171 schools or grade groupings which the desegregation plan requires to have specific pupil racial compositions. The Desegregation Plan as amended, to date, makes minor changes which are not significant to the issues presently before this Court. Even a cursory review of the table contained in the Addendum to this petition reveals the frequency with which the District Court utilized specific racial quotas which can only gratuitously be denominated as flexible. In light of the fact that the school system's racial composition is approximately 20 per cent black, several definitive trends emerge from an examination of the frequency with which the District Court utilizes certain specific racial quotas.

Only 4.7 per cent or 9 of the 171 schools and grade groupings denominated by the District Court allow a deviation from the "norm" by more than 10 percentage points. Four of the nine schools in this group are exempted from the transportation reassignment provisions of the District Court's desegregation plan of July 30, 1975. Nearly 78 per cent of the schools or

grade groupings denominated by the District Court's desegregation order of July 30, 1975 vary from the pupil racial composition of the school district by five percentage points or less. 67 Per cent of such number vary by four or less percentage points and 58 per cent vary by three or less percentage points. Exempted schools and grade groupings account for approximately one-half of the schools or grade groupings found in the upper five percentile points and lower three percentile points within the range specifically established by the District Court's desegregation plan of July 30, 1975. Even this mild concession to flexibility, however, does not make any allowance for times and distances of busing pupils. The phenomenon of the exempted school is based almost entirely on the incidences of integrated housing patterns in the Louisville-Jefferson County Metropolitan Area. It is significant that the number of exempted schools under the JET Plan is significantly greater than those established by the District Court's desegregation plan of July 30, 1975 due to the wider range of acceptable racial compositions incorporated in the JET Plan.

The Court can immediately discern from the table of racial ratios in the Addendum to this petition that the District Court utilizes the racial percentages from 15 per cent through 20 per cent almost exclusively for schools which are not exempted under the desegregation order of July 30, 1975 and are consequently involved in the transportation reassignment provisions of such plan. The extremely high frequency of the utilization of these percentages however does not stem directly

from the fact that the pupil racial composition of the entire school system is approximately 20 per cent black pupils. The extremely high frequency results instead from the specific pupil assignment methodology utilized by the District Court. This pupil assignment methodology sought to establish a uniform frequency of desegregation reassignment for pupils of a given race and anticipated that white children would be bused either once in five years or once in six years. Similarly black children would be required to be bused four out of every five school years or five of every six school years. The application of these overriding considerations specifically determine the relative frequency of 16 per cent (plus or minus one per cent) and 20 per cent (plus or minus one per cent) as the necessary racial quotas in the schools affected by the transportation reassignment or busing provisions of the District Court's desegregation order of July 30, 1975.

Indeed the only reason for any deviation from the 16 per cent and 20 per cent figures is simply a reflection of the minor degree of desegregation in the housing patterns in the clustered schools. It is readily apparent from a review of the geographic implications of the demographic picture in the Louisville Metropolitan Area that the time and distance involved in the desegregation bus runs of the clustered schools under the District Court's desegregation order of July 30, 1975 makes no significant statistical impact whatsoever on the racial quotas fixed for the individual schools in the system by such desegregation plan. At the very least, it is readily apparent that the required pupil racial

compositions under the District's Court's plan for the vast majority of schools and grade groupings denominated by such plan has little or no relationship whatsoever to the pupil racial composition of the individual school attendance zones.

The undisputed fact concerning the student reassignment methodology adopted by the District Court and incorporated in its desegregation plan is that *every* individual school operated by the school system has a required racial composition of a *substantially white majority* which in every case except nine exceeds 70 per cent, despite the fact that the residential population in the individual school zones has no meaningful relationship to the racial composition of the student body for such school created by the District Court's desegregation plan of July 30, 1975.

On September 4, 1975, the defendant school system began implementation of the plan of desegregation ordered by the District Court on July 30, 1975. Such plan and its implementation required the additional transportation of approximately 23,000 students over and above the extensive transportation already required under State law.

The Board of Education of Jefferson County, Ky. immediately began the process of appeal from the District Court's desegregation order of July 30, 1975. Indeed on July 28, 1975, the Board adopted a resolution authorizing counsel for the petitioner here to proceed with the necessary appellate steps. (Appendix, pp. 91-93) Motions for stay of the District Court's desegregation order of July 30, 1975 were summarily denied both

by the Court of Appeals and Justices Blackmun and Powell of this Court. (Appendix, pp. 124-126; 127)

The District Court retained jurisdiction over this matter to monitor the implementation of its desegregation plan of July 30, 1975. In this capacity, the District Court held hearings in early May, 1976 designed to review the implementation of its desegregation plan during the school year 1975-76 and review the need for amendments to its desegregation order of July 30, 1975. The eventual order of the District Court resulting from such hearings was entered on August 2, 1976 and an appeal concerning same is presently being prosecuted by the petitioner here in the Sixth Circuit. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed,* No. 76-2301, *supra.* It is not the purpose of the petitioners to prematurely argue the merits of the District Court's amended desegregation order of August 2, 1976. The amendments ordered by the District Court, however, are significant to the issues presently before this Court to the extent that they reveal the actual intent of the District Court in regard to certain provisions of its desegregation order of July 30, 1975.

Briefly, the District Court found in May, 1976 that 28 of the elementary schools operated by the school system were not within the racial quotas set for elementary schools by the District Court's original desegregation order of July 30, 1975. However, the District Court found no disparity in the racial compositions of the middle schools and high schools operated by the defendant school system. The District Court summar-

ily determined that the "imbalances" found in the 28 elementary schools in question were impermissible per se. Consequently the District Court on May 6, 1976 entered an order appointing a special committee to draft an amendment to the original desegregation order of July 30, 1975 which would bring the errant elementary schools back within the racial quotas set by the District Court's original desegregation order. The District Court's special committee performed its duty as charged and submitted a plan designed to accomplish this result to the District court on June 17, 1976. The proposed requirement of busing an additional 900 black children per year was not accepted blindly by the black community which requested and obtained a hearing on July 2, 1976. The District Court nevertheless adopted the recommendation of its special committee in its amended desegregation order of August 2, 1976.

On August 23, 1976, the Court of Appeals affirmed the District Court's original desegregation order of July 30, 1975. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.,* No. 75-2032, 75-2188, 76-1413, 76-1414, *supra.* It is the decision of the Court of Appeals which the petitioner seeks to review by writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I. The Rejection By the District Court of the Constitutionally Sufficient Desegregation Plan of the Petitioner School System Disregards the Decisions of This Court.

The two specific reasons for granting the requested writ of certiorari directed to the United States Court of Appeals for the Sixth Circuit's judgment of August 23, 1976 are very closely inter-related. Indeed it is very difficult to understand the District Court's motivation for the rejection of the constitutionally sufficient plan of desegregation offered by the petitioner school system denominated as the JET Plan. The rationale of the District Court in this regard can only be fully explained in light of the presumption contained in the plan of desegregation ultimately adopted by the District Court. In both the rejection of the constitutionally sufficient JET Plan and the specific adoption of the racial quotas adopted in the desegregation plan of July 30, 1975, the District Court misconstrued the original decision of the Court of Appeals in this matter as requiring a semblance of racial balance in each individual school operated by the school system.

It is easy to understand the confusion of the District Court in this regard in the light of the Court of Appeals opinion of August 23, 1976. Such confusion however is not excusable in light of the clear language of *this* Court's leading decision concerning the proper considerations for the formulation of a desegregation plan, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1974).

The analysis of the Court of Appeal in its original determination that the defendant school systems were impermissibly racially segregated (*Newburg, supra,* 489 F. 2d 925) undoubtedly convinced the District Court that the appropriate constitutional standard in formulating a desegregation plan for the defendant school systems compelled the degree of racial balancing revealed in the District Court's desegregation order of July 30, 1975.

Faced with the fact that the defendant school systems had almost immediately after the decision in *Brown I* begun extensive attempts at voluntary desegregation, the Court of Appeals had to abandon the normal criteria for determining the existence of impermissible state action resulting in segregated schools. The law of Kentucky prior to 1954, compelled the segregation of the races in public schools in the Commonwealth. The defendant school systems were, however, perhaps the first school systems in the country to voluntarily attempt to desegregate. As a result of this difficult factual situation, the Court of Appeals determined that a sufficient showing of unconstitutional state action stems solely from the fact that many of the schools operated by the defendant school systems were racially monolithic, thus implying the necessary state action component as a condition precedent to the imposition of the desegregation remedy. In making this conceptual leap the Court of Appeals chose to completely ignore the positive factual finding of the District Judge that demographic patterns were the substantial cause of the racially monolithic character of many of

the schools operated by the defendant school systems. Clearly, the analysis of the Court of Appeals, in its original decision of December 28, 1973, turned entirely on whether or not a specific school was "racially identifiable". The District Court, in following the standard laid down by the Court of Appeals, erroneously determined that such a standard required in the Jefferson County system a desegregation remedy which insured that no school, in the school system, regardless of the demographic situation of the neighborhood, contain a school with a substantial minority of black pupils.

In this Court's landmark decision in the *Swann* case, Chief Justice Burger, in apparent anticipation of the difficulties encountered by the district courts in the formulation of desegregation remedies, thoroughly discussed the precise nature of the exercise of the remedial discretion of the Federal Courts in the desegregation area of civil rights litigation. "The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts." *Swann, supra,* 402 U. S. 1, 15.

Swann properly places the basic responsibility for the formulation of a constitutionally sufficient desegregation remedy given a finding of impermissible segregative activity upon the school system. Chief Justice Burger quotes extensively from *Brown* v. *Board of Education of Topeka II,* 349 U. S. 249 (1955) to underscore this basic principle.

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. *Brown II, supra,* 349 U. S. 249, 299."

This Court expanded upon this basic principle of *Brown II in Green* v. *County School Board,* 391 U. S. 430 (1968).

> "The burden on a school board today is to come forward with a plan that promises realistically to work *now* . . . until it is clear that state imposed desegregation has been completely removed. *Green, supra,* 391 U. S. 430, 439."

In *Green,* this Court further held that school authorities are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". 391 U. S. at 437-438.

Chief Justice Burger expanded upon the rationale of *Brown II* and *Green* by the specific recognition that the necessity for the fashioning of a judicial remedy does not necessarily invest the district courts with the power to formulate such a remedy in a vacuum. "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters *only* when local authority defaults." *Swann, supra,* 402 U. S. 1, 16 (Emphasis added).

It is clear from *Swann* that a district court can only proceed to fashion a desegregation remedy if and when

school authorities fail to come forward with a constitutionally sufficient plan of desegregation which reasonably promises to remedy the constitutional violation previously determined in the immediate future. *Swann, supra,* 402 U. S. 1, 15.

This Court's decision in *Swann* definitively enumerates that the primary consideration for a court of equity which is faced with the formulation of a desegregation remedy.

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II.*" *Swann,* 402 U. S. 1, 16.

The primary duty with which a district court is charged in fashioning a desegregation remedy is to design a remedy comensurate with the degree of the particular constitutional violation involved and at the same time eliminate the violation. "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann,* 402 U. S. 1, 16.

> ". . . (A) School desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the constitution . . .

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Swann,* 402 U. S. 1, 15-16.

In analyzing the JET Plan submitted by the petitioner school system in compliance with the order of the District Court of January 30, 1975, and in accordance with its affirmative duty to come forward with a plan which promises to eliminate the constitutional violation found by the Court of Appeals, the District Court was faced with the application of two potentially conflicting standards. Clearly the scope of a remedy *compelled* by the nature of the violation found to exist by the Court of Appeals would be appropriately considerably narrower than the scope of a plan of desegregation which the petitioner school system might wish to *voluntarily* adopt and implement in the exercise of its plenary powers under state law. Indeed the plan of desegregation submitted to the District Court by the Board of the former Louisville District calls for considerably more recial balance than even the plan of desegregation adopted by the District Court on July 30, 1975.

In *Swann,* this Court held that the remedy *compelled* by the finding of unconstitutional segregation

by a school system was merely to eliminate the dual aspects of the school system.

> "We are concerned in these cases with the elimination of the *discrimination* inherent in dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. . . . It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. . . .
>
> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportional racial concentrations in some schools." *Swann*, 402 U. S. 1, 22-23. (Emphasis added.)

Utilizing these principles for the formulation and review of constitutionally required remedies in this desegregation area, it is apparent that the District Court abused its discretion in rejecting the plan of desegregation tendered by the petitioner school system, the JET Plan. Significantly, even though racial isolation with respect to housing patterns in Jefferson County, Kentucky unfortunately reflects to a substantial degree the racial isolation which is typical in large metropolitan areas throughout the country, the

JET Plan calls for a racial composition in *every* school within the system of at least 10 per cent plack pupils. Conversely, no school in the system would have a racial composition in excess of 50 per cent black pupils. When this range of ultimate racial composition is reviewed in light of the racial composition of the entire school system of 80 per cent white, 20 per cent black, it is obvious that the remedy proposed by the petitioner school system is not only constitutionally sufficient, but may well exceed the requirements of this Court's decision in *Swann,* and thus to a degree reflect the educational policy of the Board of Education of Jefferson County, Kentucky.

In *Swann,* the District Court had patiently requested that the defendant school system come forth with an acceptable plan of its own on at least three occasions. In the matter at bar, the petitioner school system promptly complied with the order of the District Court of January 30, 1975 and in tendering the JET Plan, as supplemented, presented the District Court with an extensive plan specifically designed to remedy the constitutional violation found by the Court of Appeals. The proper standard for review of the JET Plan submitted by the petitioner school system under the guidelines enunciated in *Green* was, simply stated, whether or not the plan could be reasonably expected to work. ". . . [A] School authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness." *Swann,* 402 U. S. 1, 25. The data base on which the JET Plan operates is essentially the exact same data base ultimately used by

the District Court in the formulation of its desegregation plan of July 30, 1975. The District Court adopted almost without change the redesigned individual school attendance zones proposed by the JET Plan. The only substantial difference between the JET Plan, with its procedural emphasis on the importance of the neighborhood school, and the plan of desegregation adopted by the District Court of July 30, 1975 is the *degree* of racial balance compelled by the District Court's order. In promulgating a true range of acceptable racial ratios (10 per cent black to 50 per cent black) rather than concentrating on three or four racial ratios (16 per cent, plus or minus one per cent; 20 per cent plus or minus one per cent) the JET Plan not only complies with the standard of constitutional sufficiency, but also requires the busing of eight to ten thousand pupils less than the plan of desegregation adopted by the District Court on July 30, 1975.

It should be noted that the JET Plan did not contemplate the existence of any one race or virtually one-race schools in the school system, in spite of this Court's acceptance of such a circumstance given an appropriate factual situation reflecting significant racial isolation with respect to housing patterns.

> "In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation . . .

> (I)t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann,* 402 U. S. 1, 26-27.

The racial isolation of the northwestern quadrant of Jefferson County, Kentucky is well documented in the exhibits to the various plans filed in the District Court. It is no coincidence that the schools serving that geographic area have been for a number of years all black or virtually all black in pupil racial composition in spite of the voluntary free-transfer plan implemented by the former Board of Education of Louisville, Kentucky.

In a factual situation almost identical with respect to the general demographic situation to that in this case, this Court denied certiorari from the decision of the Court of Appeals affirming a plan of resegregation for the Memphis School System which contemplated the continued existence of numerous one-race schools. *Northcross* v. *Board of Education of Memphis City Schools,* 489 F. 2d 15 (6th Cir. 1973), *cert den.,* 416 U. S. 962 (1974). While the racial composition of the Memphis schools reflects a significantly higher proportion of black pupils in the student body of the entire system, the recial isolation of the black community in Memphis is not significantly greater in most instances than the racial isolation of the substantial portion of the black community in Jefferson County, Kentucky. Certainly the geographic distances involved in the length of bus rides required to effect any substantial

degree of desegregation is not significantly proportionally greater in the Memphis situation than it is in the case at bar. Indeed at the present time under the desegregation order of the District Court of July 30, 1975 a number of pupils are required to ride on school buses from their homes to their schools for in excess of an hour. This involves first riding a bus to their home school which in some cases involves a 45 minute bus ride and then boarding another but for an additional ride of 20 to 30 minutes to get to their ultimate school attendance. This double-busing is required by the considerable strain placed on the physical facilities of the school system by the busing of the 23,000 additional pupils required under the District Court's desegregation order of July 30, 1975.

In light of the demographic realities of the situation in Jefferson County, Kentucky, a plan of desegregation which contemplated the existence of five to 10 all black or virtually all black schools with a general range of racial compositions essentially similar in all other respects to that contemplated in the JET Plan for the remaining schools operated by the system would indeed be constitutionally sufficient. In light of that situation, it is difficult to comprehend the District Court's rejection of the JET Plan which scrupulously avoids the phenomenon of the one-race or virtually one-race school. The District Court has impermissibly required in rejecting the JET Plan a degree of racial balance specifically rejected by this Court in *Swann*.

II. A Plan of Desegregation Which Sets Racial Quotas for 80 Per Cent of the Individual Schools in a System Within 5 Per Cent or Less of the Racial Composition of the System Is Impermissibly Inflexible and Raises Racial Balance to the Level of a Substantive Constitutional Right in Violation of the Decisions of This Court.

The action of the District Court in rejecting the constitutionally sufficient plan of desegregation tendered by the petitioner school system is not the only compelling reason that this Court should direct a writ of certiorari to the Court of Appeals to correct the misapplication of the leading decisions of this Court (particularly *Swann*) by the District Court and the Court of Appeals. An analysis of the plan of desegregation adopted by the District Court on July 30, 1975 reveals that this plan raises a particular degree of racial balance to the level of a substantive constitutional right in specific violation of this Court's admonition in *Swann*.

In *Swann*, the defendant school board raised, *inter alia*, the issue set forth in this petition that the District Court over-relied on the use of predetermined racial ratios in formulating its remedy. This Court responded:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of

the school system as a whole. *Swann,* 402 U.S. 1, 24. See also *Winston-Salem/Forsyth County Board of Education* v. *Scott,* 402 U.S. 1221, 1227-29 (1971).

In the recent decision of this Court in *Pasadena City Board of Education* v. *Spangler,* —— U.S. ——, 96 S. Ct. 2697 (1976), this Court again dealt with issues essentially similar to those presently before the Court in this petition. In *Pasadena,* the District Court in 1970 had entered a desegregation order requiring that there be no majority of any minority in any Pasadena school. The propriety of that decree was not before this Court in *Pasadena* as no appeal was taken from *that* desegregation order. In discussing the implications of this provision with respect to the actions of the District Court in the post-implementation period, Mr. Justice Renquist reaffirmed this Court's condemnation in *Swann* of the enforcement of a particular degree of racial balance as a substantive constitutional right.

> Even had the district court's decree been unambiguous and clearly understood by the parties to mean what that court declared it to mean in 1974, the "no majority of any minority" provision would, as we have indicated previously be contrary to the intervening decision of this Court in *Swann, supra. Pasadena, supra,* 96 S. Ct. 2697, 2705.

The District Court's desegregation plan for the Pasadena Unified School District was identical to the plan of desegregation adopted by the District Court here on July 30, 1975, both in its requirement of a particular degree of racial balance, and in its requirement of the indefinite perpetuation of that degree of racial balance regardless of the precipitating cause of any deviance in the individual schools from such required racial quotas.

> The District Court's interpretation of the order appears to contemplate the "substantive constitutional right (to a) particular degree of racial balance or mixing" which the Court in *Swann* expressly disapproved. . . . It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be inappropriate; . . . but instead as an "inflexible requirement," . . . to be applied anew each year to the school population within the attendance zone of each school. *Pasadena,* —— U. S. ——, 96 S. Ct. 2697, 2703-04 (Citations omitted)

The plan of desegregation ordered by the District Court in this litigation requires a particular degree of racial balance in each school operated by the petitioner school system in two regards. First, while ostensibly denominating a range of acceptable pupil compositions (12 to 40 per cent black for elementary schools and 12½ to 35 per cent black for middle schools and high schools), the District Court only effectuates the full ramifications of that range to a small degree by its specific approval of the exemption from the transportation reassignment provisions of the plan of a handful of schools. As previously demonstrated, the District

Court specifically required that 80 per cent of all schools and grade groupings denominated by its desegregation plan reflect a specific racial quota within plus or minus five per cent of the racial composition of the student body of the school system as a whole. Further, as the District Court relied primarily on a specific racial ratio of 16 per cent plus or minus one per cent and 20 per cent plus or minus one per cent in order to effect the arbitrarily determined number of years each child would directly be involved in the transportation reassignment provisions of the desegregation plan of July 30, 1975. These latter provisions clearly deny that degree of flexibility which this Court has required in the fashioning of desegregation plans. *Swann,* 402 U.S. 1, 15.

The plan of desegregation approved by the District Court on July 30, 1975, specifically provides for the perpetual reallignment of the student racial compositions in the individual schools operated by the system to account for annual changes in the demographic pattern of Jefferson County, Kentucky.

> "As set out hereinafter, if any individual school ratio or population changes in a material fashion, appropriate steps will be taken to include that individual school and its students in the general transportation plan." (Appendix, pp. 55-56)

As indicated hereinabove, the District Court found it necessary to amend its desegregation plan to perpetuate the "integrity" of the racial quotas contained therein on August 2, 1976 due to non-participation in

the Court's plan by white pupils (white flight). This specific issue is presently before the Court of Appeals on appeal by the petitioner school system. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed,* No. 76-2301, 6th Cir., Sept. 30, 1976. While the merits of such a step are not before this Court directly in this petition, here, as in *Pasadena,* such a provision for perpetual reallignment of the plan to insure the integrity of the racial quotas denominated in the plan is a clear and unmistakable indication of the inherent and impermissible inflexibility of the plan and its elevation of racial balance to the level of a substantive constitutional right contrary to the express language of Chief Justice Burger in *Swann,* 402 U.S. 1, 24.

CONCLUSION

While this Court, by its very nature, is ill-equipped to specifically review the merits of every issue raised in the numerous desegregation cases presently in prosecution at all levels of the Federal Courts, it is clear from the case at bar, other cases presently pending here, and the recent decisions of this Court, that the Circuit Courts of Appeal are still very much in need of guidance by this Court in this difficult area of the law. It is no answer to the litigants that these cases are difficult of resolution. The delicate balancing of the collective interests involved intimately affects the lives of many thousands of children and their families. The Judgment of the Court of Appeals in this matter of August

23, 1976 presents issues of imperative public importance and at the same time conflicts with the principles set forth in the leading decisions of this Court.

We respectfully request that this Court issue a writ of certiorari to review that Judgment.

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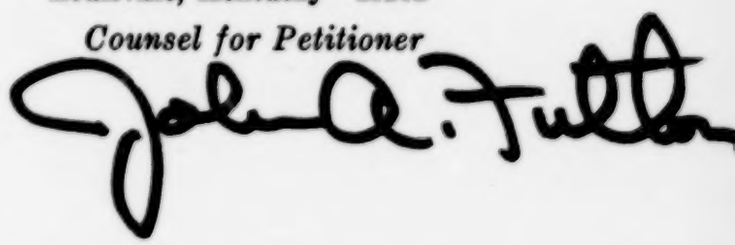
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November 21, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1976, three copies of this Petition for Writ of Certiorari and accompanying separate Appendix were mailed, postage prepaid to: Mr. Thomas Hogan, 701 W. Walnut Street, Louisville, Kentucky, Counsel for Respondent; Mr. Henry A. Triplett, 231 S. 5th Street, Louisville, Kentucky; and Mr. J. Bruce Miller, 1112 Kentucky Home Life Bldg., Louisville, Kentucky, Counsel for Intervenor.

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ADDENDUM

RACIAL RATIOS SET BY DESEGREGATION ORDER

Twelve Percent

Bruce Middle School*
Hazelwood Elementary*
Watterson Elementary*

Thirteen Percent

Meyzeek (7-9)
Myers Middle School*
Western Junior High (County)*

Fourteen Percent

Butler Junior High*
Central (10-12)

Fifteen Percent

Blake
Blue Lick
Cochrane
Conway (Grade 6)
Fairdale Elementary
Filson
Greenwood
Johnston*
Johnsontown
Kennedy, A.
Knight (Grade 6)
Laukhuf
Minors Lane
Sanders
Shawnee (10-12)
Wheeler
Wilkerson
Wilt

Sixteen Percent

Bowen
Carrithers (Grade 6)
Doss (9-12)

Sixteen Percent (Cont'd)

Fairdale (9-12)
Kammerer (Grade 6)
Lowe
Luhr
Okolona
Semple
Southern Junior High (City)*
St. Matthews
Trunnell
Waggener (9-12)
Wilder

Seventeen Percent

Atherton (10-12)
Auburndale
Ballard (9-12)
Bloom
Camp Taylor
Dixie
Eastern (9-12)
Field
Frost (Grade 6)
Gutermuth
Jacob
Jeffersontown Elementary
Jeffersontown (9-12)
Klondike
Lassiter (Grade 6)
Layne
Pleasure Ridge Park (9-12)
Schacklette
Shawnee (7-9)
Seneca (9-12)
Shyrock
Stewart
Valley Elementary
Valley (9-12)
Waller

Seventeen Percent (Cont'd)

Wellington
Westport (9-12)
Williams (Grade 6)

Eighteen Percent

Belknap
Cochran
DuValle (7-9)
Fern Creek (9-12)
Frayser
Gilmore Lane
Kenwood
Kerrick
Lowell
Medora
Moore (9-12)
Norton
Rangeland
Southern (9-12)
South Park
Stonestreet
Watson Lane

Nineteen Percent

Bates
Chenoweth
Conway (6-8)
Crums Lane
Doss (7-8)
Durrett (7-8)
Durrett (9-12)
Eisenhower
Fairdale (7-8)
Fern Creek Elementary
Franklin
Frost (6-8)

Nineteen Percent (Cont'd)

Goldsmith
Hite
Iroquois (7-9)
Knight (6-8)
Lassiter (6-8)
Pleasure Ridge Park (7-8)
Prestonia
Rutherford
Smyrna
Southern (7-8)
Stuart
Valley (7-8)
Williams (6-8)
Zachary Taylor

Twenty Percent

Byck
Crosby (Grade 6)
Crosby (6-8)
Hawthorne
Highland (7-9)
Lincoln
Middletown
Mill Creek*
Parkland (7-9)
Slaughter*
Stivers

Twenty-One Percent

Ballard (7-8)
Dunn
Eastern (7-8)
Greathouse
Kammerer (6-8)
Waggener (7-8)
Westport (7-8)

Twenty-Two Percent

Barret (7-9)
Butler High*
Fern Creek (7-8)
Indian Trail*
Roosevelt*

Twenty-Three Percent

Carrithers (6-8)
Iroquois High*
Jeffersontown (7-8)
Moore (7-8)

Twenty-Four Percent

Ahrens High*
Noe Junior High*

Twenty-Six Percent

Harstern
Perry
Western High
Wheatley

Twenty-Seven Percent

Atkinson*
Strother
Thomas Jefferson*
Western Junior High (City)*

Twenty-Eight Percent

Jones
McFerran
Price
Shelby Elementary*
Woerner Junior High

Twenty-Nine Percent

Carter
Coleridge-Taylor
Englehard Elementary*
Manual High*
Schaffner
Shawnee Elementary

Thirty Percent

Brandeis
Foster

Thirty-One Percent

King

Thirty-Two Percent

Breckenridge Elementary*
J. F. Kennedy
Parkland

Thirty-Three Percent

Bashford Manor*
Cane Run

Thirty-Four Percent

Portland Elementary*
Young

Thirty-Seven Percent

Newburg Middle School

The Court should note that Male High School from Cluster #2 in the Court's Plan (App. A) is omitted from the foregoing table. Counsel has been unable to determine at this time if the percentage listed in the plan is the result of a typographical error or a demographic error. One of the schools in this cluster has been subsequently exempted by the District Court from the desegregation plan, thus the percentages for all schools within that cluster, are in all probability, erroneous as of the date of the filing of this brief.

Supreme Court, U. S.
FILED
1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-710

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST, ET AL. - - - Respondents

AND

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - Petitioners

versus

JOHN E. HAYCRAFT and HAZEL K. LANE, ET AL. - - - Respondents

L. J. HOLLENBACH, III, County Judge - Intervenor

(Other parties respondent on inside cover)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents in Board of Education v. Newburg:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

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(Other parties respondent on inside cover)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

For the reasons set forth in the Petition for Writ of Certiorari previously filed herein and in this Supplemental Brief, the Petitioners, Board of Education

of Jefferson County, Kentucky and its Superintendent, Ernest Grayson, respectfully pray that a Writ of Certiorari issue to review the decision rendered in this case on August 23, 1976, by the United States Court of Appeals for the Sixth Circuit.

REASON FOR SUPPLEMENTAL BRIEF

On August 23, 1976, the United States Court of Appeals for the Sixth Circuit rendered its decision in *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir. 1976). In that decision the Court of Appeals affirmed the desegregation order of the United States District Court for the Western District of Kentucky at Louisville, entered on July 30, 1975. The Petitioners filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on November 20, 1976. A response was filed to the Petition by the former Board of Education of Louisville, Kentucky on or about December 15, 1976.

Since the filing of the Petition for Writ of Certiorari, this Court delivered its Per Curiam opinion in *Austin Independent School District* v. *United States,* —— U. S. ——, 1976, 45 L. W. 3413. Mr. Justice Powell filed a concurring opinion in that matter in which he was joined by the Chief Justice and Justice Rehnquist. This Supplemental Brief is directed to an analysis of the issues before the Court in this matter in light of the decision in the *Austin* case, *supra.*

This Supplemental Brief is filed pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States which reads in its relevant part as follows:

> (5). Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Original Finding of a Constitutional Violation Must Be Reexamined in Light of This Court's Recent Application of the Standard of *Washington* v. *Davis* to School Desegregation Litigation.

Certiorari should be granted by this Court so that the original decision of the Court of Appeals may be reexamined at this time to bring it into conformity with this Court's recent decisions. The majority opinion of this Court in *Austin, supra,* by its application of the rationale of *Washington* v. *Davis,* 426 U. S. 229 (1976), has indicated that in school desegregation cases, as in other types of civil rights litigation, the "state action" requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution compels that any finding of a constitutional violation must be based upon a showing of more than just a racially disproportionate impact from official action.

This Court, in *Keyes* v. *School District No. 1,* 413 U. S. 189 (1973), enunciated the relevant burden of proof for those who wish to demonstrate a constitutional violation sufficient to justify a remedial desegregation order. The standard was referred to by analogy in *Washington* v. *Davis, supra.*

> The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action. . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation. . . . is purpose or intent to segregate." *Washington* v. *Davis, supra,* 426 U. S. 229, 96 S. Ct. 2040, 2048, quoting *Keyes, supra,* 413 U. S. 189, 205, 208.

This Court's majority decision in *Austin, supra,* compels the application of this standard to school desegregation litigation where there is a history of *de jure* separation of the races. The factual situation in the case at bar is essentially similar to *Austin, supra,* in all relevant respects and consequently, this Court's recent action vacating *United States* v. *Texas Education Agency,* 5th Cir. 1976, 532 F. 2d 380 (*Austin II*) compels a reexamination of the Court of Appeals' original finding of a constitutional violation in this matter in 1973.

In December, 1973, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court of March 8, 1973, dismissing the complaint in these consolidated actions. The Court of Appeals found that the defendant school systems were operating dual school systems in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This original decision of the Court of Appeals was vacated by this Court on other grounds and remanded to the Court of Appeals for reconsideration in light of this Court's concurrent decision in *Milliken* v. *Bradley,* 418 U. S. 717 (1974).

Newburg Area Council v. *Board of Education of Jefferson County, Ky.,* 6th Cir. 1973, 489 F. 2d 925 (*Newburg I*) *vac.* 418 U. S. 918 (1974).

Upon remand, the Court of Appeals distinguished *Milliken, supra,* and reinstated its finding in December, 1973 of a constitutional violation. A petition for writ of certiorari directed to that decision of the Court of Appeals was sought by the petitioners here and was denied by this Court. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.,* 6th Cir. 1974, 510 F. 2d 1358 (*Newburg II*), *cert. den.* 421 U. S. 931 (1975).

It is a well established principle that the denial of certiorari by this Court in 1975 does not preclude a reexamination by this Court of the issues raised in the 1975 certiorari petition. *United States* v. *Carver,* 260 U. S. 482, 490 (1923). *Accord, Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 917 (1950); *Brown* v. *Allen,* 344 U. S. 443, 492 (1953); cf. *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974) and *Massachusetts Board of Retirement* v. *Murgia,* —— U. S. —— (1976), 96 S. Ct. 2562, 2564. *See generally Pasadena City Board of Education* v. *Spangler,* —— U. S. —— (1976), 96 S. Ct. 2697, 2705 and, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15-17 (1971) for the proposition that federal courts in desegregation litigation invoke equity jurisdiction.

This Court recently was confronted with the weight to be given prior certiorari proceedings in *Hughes Tool Company* v. *Trans World Airlines, Inc.,* 409 U. S. 363 (1973). In 1964 this Court granted Hughes Tool Com-

pany's petition for certiorari. *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 379 U. S. 912 (1964). In March 1965, however, after argument, the writ of certiorari was dismissed as improvidently granted in a Per Curiam opinion of this Court. *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 380 U. S. 248 (1965). Hughes Tool Company again sought a petition for writ of certiorari in this Court and in 1973, Justice Douglas, writing for the Court, held that the prior dismissal of the 1964 writ of certiorari as improvidently granted ". . . did not establish the law of the case or amount to *res adjudicata* on the points raised", citing with approval *Baltimore Radio Show, Inc., supra. Hughes Tool Company, supra,* 409 U. S. 363, 364, fn. 1.[1]

This Court has traditionally required as a condition precedent to the determination of a violation of the Equal Protection Clause a finding that the activity complained of was the product of *intentional* discrimination. In desegregation litigation this Court has required that segregative intent upon the part of the school authorities be shown to meet the minimum requirements of the "state action" component of the Equal Protection Clause. *Washington* v. *Davis* clearly holds that in meeting this burden, it is *not* sufficient

[1]See also *Hanover Shoe, Incorporated* v. *United Shoe Machinery Corporation,* 392 U. S. 481, 488, fn. 6 (1968) and *Mercer* v. *Theriot,* 377 U. S. 152 (1964) where the Court considered in a Per Curiam opinion joined in by eight Justices *both* substantial federal questions raised in an earlier petition for writ of certiorari which was denied *and* substantial federal questions raised by proceedings in the lower courts subsequent to the original denial of the first petition for writ of certiorari.

for making a finding of unconstitutional intent to demonstrate that activity which is racially neutral on its face has a racially disproportionate impact.

> . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. *Washington* v. *Davis, supra,* 96 S. Ct. 2040, 2047. (Emphasis by the Court.)

Justice White, writing for the majority in *Washington* v. *Davis,* presents a definitive compendium of the disparate treatment by this Court of this standard of proof in many areas of civil rights litigation.

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. . . . We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. 96 S. Ct. 2040, 2048, 2049.

This Court has most recently acknowledged the viability of the standard of *Washington* v. *Davis, supra,* by its reversal in *Village of Arlington Heights* v. *Metro-*

politan Housing Development Corporation, 517 F. 2d 409 (7th Cir. 1975), *rev. and remanded,* —— U. S. —— (1977), 45 L.W. 4073. In *Arlington Heights, supra,* Justice Powell, writing for the majority, cited this Court's decision in *Washington* v. *Davis* as controlling. *Arlington Heights, supra,* 45 L. W. 4073, 4077.

Of even greater significance to the issues before the Court in this matter is the in-depth discussion in *Arlington Heights, supra,* of the appropriate standard for proving the racially discriminatory purpose required by *Washington* v. *Davis.* In *Arlington Heights,* this Court proceeded to apply the enunciated standard to the facts before it in that matter. *Arlington Heights, supra,* 45 L. W. 4073, 4077-78. The petition for certionari should be granted in *this* matter so that a similar application of the *Washington* v. *Davis* standard may now be made, since it is clear that the Court of Appeals has held the defendant school system to a standard never adhered to by this Court. The District Court clearly applied the *appropriate* constitutional standard in its original decisions in this matter in 1973 and found that the monolithic nature of the racially identifiable schools operated by the system at that time was indeed casually related to *segregated residential patterns* and was not exaccerbated by official action. Although the petitioners here feel that this original decision of the district court should be reinstated, it would be sufficient, upon a grant of certiorari by this Court, that an application of the standard of *Washington* v. *Davis* be undertaken independently by this Court

or upon remand by the United States Court of Appeals for the Sixth Circuit.

The application of the *Washington* v. *Davis* rationale to school desegregation litigation by the majority Per Curiam opinion of this Court in *Austin, supra,* is significant to this Court's disposition of this petition for writ of certiorari. The parallel between the factual situation with which the Fifth Circuit was confronted in *Austin I* and *Austin II*[2] and the factual situation presented to the Sixth Circuit throughout the appeliate proceedings in this matter is striking. Both Texas and Kentucky, prior to 1954, required the public school authorities to maintain separate educational facilities for black students and white students. As in most public school jurisdictions throughout this country, both the Austin Independent School District (AISD) and the school systems operating in Jefferson County, Kentucky based their attendance patterns on the familiar phenomenon of the neighborhood school.

The only significant factual distinctions between the two cases merely enhance the position of the petitioners here that the original determination of the Sixth Circuit in 1973 should be at the very least reexamined in light of *Washington* v. *Davis.* There is ample evidence in the record that significant steps were taken by both the former Board of Education of Jefferson County, Kentucky and the former Board of Education of Louisville, Kentucky immediately subsequent to this Court's decision in *Brown* v. *Board of Education of*

[2] *United States* v. *Texas Education Agency,* 5th Circuit 1972, 467 F. 2d 848 *(Austin I); United States* v. *Texas Education Agency,* 5th Circuit 1976, 532 F. 2d 380 *(Austin II).*

Topeka I, 347 U. S. 483 (1954) to eliminate the vestiges of previous state-imposed racial separation in the public schools. The record in *Austin I* and *Austin II* indicates a singular lack of any similar effort on behalf of the AISD, but this Court nevertheless properly vacated those decisions of the Fifth Circuit and remanded for a reconsideration of the question of the existence of a constitutional violation in light of *Washington* v. *Davis*.

The analysis of the United States Court of Appeals for the Sixth Circuit in *Newburg I* is somewhat more subtle than the inaccurate analysis of the Fifth Circuit in *Austin I* and *Austin II*, but it is nevertheless a misapplication of the leading decisions of this Court. The primary stumbling block of the Court of Appeals in *Newburg I* is the continued over-emphasis of racial identifiability of schools operated at that time by the defendant school systems.

> The Jefferson County school district thus has three elementary schools that either are or are rapidly becoming "racially identifiable." As stated, Newburg school, a pre-*Brown* black school, is racially identifiable while Price and Cane Run Schools are rapidly becoming racially identifiable as black schools. 489 F. 2d 925, 928.

In discussing the demographic situation in the former Louisville School District, the Court of Appeals again emphasized the racial identifiability of numerous schools operated by that system.

> A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. *Newburg I*, 489 F. 2d 925.

The Court of Appeals went on in *Newburg I* to hold that evidence demonstrating the existence of racially monolithic schools in a school system with a history of *de jure* segregation is, *in and of itself*, conclusive of a constitutional violation by such a school system.

> Regardless of any explanation for the racial composition of any of the other schools in the system, the 35 pre-*Brown* schools that have retained their pre-*Brown* racial identification to the present day stand out as clear vestiges of state-imposed segregation. *Newburg I*, 489 F. 2d 925, 931.

The district court in its original decisions in this matter in March, 1973, acknowledged the continued racially monolithic nature of numerous schools operated by the defendant school systems. This original finding of fact was not questioned by the Court of Appeals in its reversal of the decisions of the district court. The reversal of the holding of the district court was based, however, upon the analysis of the import of the essentially uncontroverted facts. The analysis of the Court of Appeals in this regard, however, was incorrect in light of this Court's decisions in *Washington* v. *Davis* and *Austin, supra,* and this Court should accept certiorari at this time to review the application by the Court of Appeals of an incorrect constitutional standard.

The analysis of the Court of Appeals in *Newburg I* is improper in several respects. The Court of Appeals bases its decision in part on an incorrect assumption (which has never been supported by this Court) through its inference that racially monolithic schools are inherently inferior. This same erroneous assumption was made by the United States Court of Appeals for the Fifth Circuit in *Austin I* and *Austin II*. This type of analysis was specifically disapproved by Justice Powell in his concurring opinion in *Austin, supra.*

> Apparently misconceiving the import of language in *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 442 (1968), to the effect that there should be no "Negro" school or "white" school, the Court of Appeals seems to believe that every school must be racially balanced to some degree . . . The effect of applying the language of *Green* to such a system may be to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. *Austin, supra,* 45 L.W. 3413, fn. 2.

The Solicitor General in the well reasoned brief on behalf of the United States in *Austin, supra,* points out the peculiar fallacy of this line of reasoning and its necessary consequence of massive busing whenever a determination of a constitutional violation is made in this manner. *Austin, supra,* 76-200, Brief for the United States, at 8, *et seq.*

The Court of Appeals in *Newburg I,* while not making the direct assertion that the use of neighborhood geographic school zoning which results in racially

monolithic schools is per se impermissible, clearly implies this result.

> Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. *Newburg I,* 489 F. 2d 925, 931.

The Court of Appeals has confused a standard for remedial tools here with acceptable evidence of a constitutional violation. Certainly the propriety of actions of a school board could not be judged by a standard which this Court has never required. The use of neighborhood school zoning is not impermissible merely because it results in racially monolithic schools.

In *Austin, supra,* the United States did not oppose the granting of a petition for writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit primarily due to the analysis by that Court of the propriety of the continued use in the South of the neighborhood school plan. As the analysis of the Court of Appeals in *Newburg I* is essentially similar to that struck down by this Court in *Austin, supra,* the excellent arguments of the Solicitor General are equally appropriate here.

> It does not follow, however, that the neighborhood school policy amounts to racial discrimination, unless the residential patterns are caused by official acts *designed* to segregate the schools. An otherwise neutral action is not discriminatory solely because it has a racially disproportionate effect. . . . By requiring the district court to infer

intent to discriminate from the fact that the school authorities have not attempted to ameliorate the effects of racial separation in residential patterns, the panel has avoided the need to prove intent to discriminate. . . . For the Court of Appeals to compel the district court to infer intent from effects alone in situations like the present one is to abolish the intent requirement and to abolish the further requirement that the racial separation [shall] have been caused by the acts of the State intended to affect the operation of the schools rather than, for example, the acts of private individuals choosing where to make their homes). *Austin, supra,* 76-200, Brief for the United States, at 6-7. (Emphasis added.)

The Solicitor General, in his brief on behalf of the United States in *Austin, supra,* suggests a standard by which the finder of fact can measure the significance of the retention of a neighborhood school plan in weighing whether or not school authorities have violated the Equal Protection Clause.

> . . . [W]hen a racially neutral neighborhood assignment policy produces no more separation than occurs in the residential patterns, only evidence that the school authorities acted with discriminatory intent will allow a finding that they practice racial discrimination. . . . Proof that school authorities added to racial separation may be enough to support a finding of intent; proof that school authorities failed to reduce separation attributable to forces outside the schools is never (by itself) enough. *Austin, supra,* 76-200, Brief for the United States, at 8.

Justice Powell in his concurring opinion in *Austin, supra,* emphasizes the dangers of disapproval per se of the continued use of neighborhood school zoning.

> The principal cause of racial and ethnic imbalance . . . is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns. *Austin, supra,* 45 L.W. 3413.[3]

Justice Powell, in his concurring opinion in *Austin, supra,* further recognized the danger of per se disapproval of the neighborhood school plan and appears to approve the standard suggested by the Solicitor General.

> The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court. *Austin, supra,* 45 L.W. 3413.

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[3]Please also see the admonition of Chief Justice Burger in *Swann, supra:* "the elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage." 402 U. S. 1, 22.

The record in *this* matter does not support a holding that any action or failure to act on behalf of the defendant school systems resulted in *more* racial segregation than is reflected by the residential patterns in the community. Indeed, the district court in its original decisions in March of 1973 specifically found that the racial compositions of the schools operated by the systems merely reflected the unfortunate racial isolation produced by segregated housing patterns in the Jefferson County metropolitan area. In light of this finding, which was undisturbed by the Court of Appeals in *Newburg I*, the continued use by the defendant school systems of neighborhood geographic school zones is racially neutral on its face and is not the proper basis of a finding of intent to segregate under this Court's decisions in *Washington* v. *Davis* and *Austin, supra*. To compel the imposition of a school desegregation remedy as a sole consequence of historical *de jure* segregation and unrelated but equally invidious residential segregation not only strips the "state action" component of the Equal Protection Clause of any meaning whatsoever, but also perpetrates an inequity upon the innocent "third parties" in desegregation litigation, the school children and their parents and families.[4]

[4]See Justice Powell's concurring opinion in *Austin, supra*, 45 L. W. 3413, 3414, fn. 7.

II. The Inclusion By the District Court in Its Desegregation Remedy of a Provision for Perpetual Realignment of Racial Quotas With a Specific "Triggering" Mechanism Demonstrates an Impermissible Goal of Racial Balance and Misapplication of the Decisions of This Court and Particularly the Concurring Opinion in *Austin Independent School District* v. *United States*.

The majority Per Curiam opinion of this Court in *Austin, supra,* vacated the judgment of the United States Court of Appeals for the Fifth Circuit in *Austin II,* remanding the case for reconsideration in light of *Washington* v. *Davis*. The majority of this Court by this action has suggested that the analysis of the courts below was sufficiently infirm on the question of whether or not there is even a constitutional violation by AISD that it was unnecessary to reach the secondary question of the appropriateness of the remedy imposed by the courts below. In the interest of judicial economy, however, Justice Powell filed a concurring opinion, in which he was joined by the Chief Justice and Justice Rehnquist, analysing in detail the specific question of the general remedial authority of the lower federal courts in the event that the United States Court of Appeals for the Fifth Circuit, on remand, reaffirmed its finding of a constitutional violation. Both the implications of this Court's majority opinion in *Austin, supra,* and the specific admonitions of Justice Powell's concurring opinion have direct and significant application to a determination of the propriety of the "remedial" desegregation plan of the district court in this matter.

The question of the *necessity* for a desegregation remedy in the first place is directly undermined by this Court's majority opinion in *Austin, supra.* The propriety of the specific remedy imposed by the district court in this matter is directly questioned by Justice Powell's concurring opinion in *Austin, supra,* and this Court's recent decisions in *Swann, Keyes, Milliken* and *Pasadena, supra.*

The desegregation plan imposed by the district court in this matter has already been discussed in detail in the petition for writ of certiorari filed herein on November 20, 1976. One provision of the district court's remedy, particularly significant in light of the analysis of Justice Powell in his concurring opinion in *Austin, supra,* is the "triggering" mechanism specifically required in the desegregation plan.

> The method of selecting students to be transported for the purpose of this desegregation plan insures that every student, within racial categories, participates as equally as possible. The only exception to this rule occurs when a student attends a school that this Court has determined is already at this time sufficiently desegregated within the guidelines set out above [60% to 88% Anglo] so that transportation is not required. *As set out hereinafter, if any individual school ratio or population changes in a material fashion, appropriate steps will be taken to include that individual school and its students in the general transportation plan.* (Pet. Appendix, pp. 55-56). (Emphasis added.)

It has already been noted that the district court, pursuant to this provision, ordered the busing of an *additional* 900 black children for the school year 1976-77 on August 2, 1976. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed,* No. 76-2301, 6th Circuit, Sept. 30, 1976. Advanced on motion by the petitioners per Chief Judge Phillips, December 16, 1976.[5]

Judge Peck of the Sixth Circuit, writing for the panel in *Cunningham* v. *Grayson, supra,* approved the desegregation plan adopted by the district court in this matter, but admonished the district judge that if he meant what he said concerning the need for perpetual realignment of the plan, such provision was, in all probability, inappropriate in light of *Pasadena, supra,* 541 F. 2d 538, 542. The panel in *Cunningham, supra,* did not feel that this was a sufficient basis, however, for invalidating the plan. Justice Powell's cogent analysis in his concurring opinion in *Austin, supra,* however, points out that this type of "triggering" condition, in and of itself, is an indicium of the realization in a desegregation plan of the constitutionally impermissible goal of racial balance.

> This aspect of the plan clearly reveals that the plan is designed to achieve some predetermined

[5]As this brief went to the printers, certiorari was granted by this Court to review the Dayton case. *Brinkman* v. *Gilligan,* 539 F. 2d 1084 (6th Cir. 1976), *cert. granted,* ___ U. S. ___ (1977), 45 L.W. 3489. Although the issues in *Brinkman, supra,* and this case on the question of the appropriateness of the remedy imposed are virtually identical, at least two factual situations in the case at bar suggest an even more aggravated misapplication of the leading decisions of this Court. First, the *Brinkman* remedy does not specifically require perpetual realignment of the plan as does the remedy here. Second, the range of acceptable ratios in *Brinkman* is in its application to individual schools considerably broader than the actual ratios for individual schools compelled by the desegregation plan in this matter.

racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding [in] *Pasadena City Board of Education* v. *Spangler*, —— U. S. —— (1976) [96 S. Ct. 2697]. *Austin, supra,* 45 L.W. 3413, fn. 3.

In light of the fact that the majority in *Austin, supra,* vacated the findings of the lower courts in *Austin I* and *Austin II* on the question of violation, the desegregation plans approved by such courts are necessarily suspect under the general equitable principle enunciated in *Swann, supra,* that the scope of a desegregation remedy is controlled by the nature of the constitutional violation in question. 402 U. S. 1, 16. The general equitable principles enumerated by Justice Powell in his concurring opinion in *Austin, supra,* however, by their singular misapplication by the district court in the fashioning of the desegregation remedy in this matter nevertheless merit comment here.

Both in the Austin plan and in the plan presently before the Court in this matter there is a requirement for a specific degree of racial balance in *every* school in the system. Similarity between *Austin II* and this matter is also seen in the dual imposition of a narrow range of acceptable racial quotas. The remarkable inflexibility and narrowness of the *range* of racial balances required by the district court here have been discussed previously in the petition for certiorari filed in this Court on November 20, 1976. It should be noted that the district court rejected in this matter a range

of constitutionally acceptable racial compositions suggested by the school system which was specifically adopted by the lower courts in *Austin II.* Justice Powell specifically criticized even these ratios in his concurring opinion in *Austin, supra,* 45 L.W. 3413.

An additional factor conclusively demonstrating the overbreadth of the desegregation plan of the district court in this matter, which appears to be without parallel in the plan affirmed by the Fifth Circuit in *Austin II,* is the requirement of the plan under review here that every school in the system have a substantial majority of white pupils. In all but nine schools out of the one hundred and seventy-seven operated by the petitioner school system, the racial quotas compelled by the desegregation plan require a majority of white pupils of 70%, or greater. The district court apparently felt that this extraordinary degree of racial balance was specifically required by the Court of Appeals' condemnation per se of the existence of "racially identifiable" black schools in *Newburg I.*

Using the rationale of the majority opinion of this Court in *Austin, supra,* the only conceivable violation by the defendant school systems in this matter concerns the underutilization of the Newburg school in light of the overutilization of nearby "white" schools and the retention of a voluntary transfer plan by the former Louisville School District. With respect to the Newburg School, the defendant school system adopted a voluntary plan of desegregation for that school which was *specifically* approved by the district court in its desegregation plan in this matter (Pet. Appendix,

p. 59). Further, the record in this matter clearly establishes that the voluntary transfer plan utilized by the Louisville School District in compliance with this Court's decision in *Brown I* as early as the 1956-57 school year, while *in theory* may have allowed black and white students to avoid the selection of desegregated schools, *in practice* has not affected the racial compositions of the schools previously operated by the former Louisville School District more than one percentage point in any school.

The massive pupil reassignment required here by the district court's desegregation order of July 30, 1975, with its concomitant large scale cross-district busing of in excess of 23,000 children is clearly inappropriate in light of the nature of the constitutional violation, if any. There has been no showing here, and indeed no attempt to demonstrate that the degree of integration attempted by the desegregation order would have existed but for the purported unconstitutional activity of the petitioners. See *Austin, supra,* 45 L.W. 3413.

In the leading decision of this Court on the question of the formulation of desegregation remedies, *Swann, supra,* Chief Justice Burger specifically admonished against an over-reliance upon racial quotas by the district courts. 402 U. S. 1, 24. Justice Powell, in his concurring opinion in *Austin, supra,* has again warned the lower courts of the erosion of the judicial system which can stem from the indiscriminate use of excessive remedies.

> I do not suggest that transportation of pupils is never a permissible means of implementing de-

segregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the *effect* of a constitutional violation. Thus, large scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is *remedial* rather than *punitive* and would rarely result in the widespread busing of elementary-age children.[7] A remedy simply is not equitable if it is disproportionate to the wrong.

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[7] . . . It is also to be remembered in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offering action but, rather upon innocent children and parents. *Austin, supra,* 45 L.W. 3413-14 (Emphasis added.)

CONCLUSION

For the reasons set forth in this supplemental brief and in the previously filed petition for writ of certiorari, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit and reverse the decisions of that Court in *Newburg II* and its progeny, *Cunningham* v. *Grayson, supra,* and reinstate the original decisions of the United States District Court for the western District of Kentucky at Louisville of March 8, 1973. In the alternative, this Court, at the very least, should vacate these decisions and remand this matter to the United States Court of Appeals for the Sixth Circuit for a re-examination of that Court's

original finding of a constitutional violation in light of the recent decisions of this Court in *Austin, supra,* and *Washington* v. *Davis* with instructions that, in the event the Court of Appeals reaffirms its original finding of a constitutional violation, the necessary desegregation remedy must be *strictly* proportional to the nature of such violation and not penal in nature.

It is further urged that in the event of a grant of certiorari contemplating a review here upon the merits, this Court in light of the similarity of issues and the compelling need for uniform application of the constitutional standards controlling the disposition of this type of case, consider the contemporaneous disposition of this matter, *Brinkman, supra,* and *School District of Omaha* v. *United States,* 521 F. 2d 530 (8th Cir. 1975) and 541 F. 2d 708 (8th Cir. 1976), *cert. filed,* 45 L.W. 3401.

Respectfully submitted,

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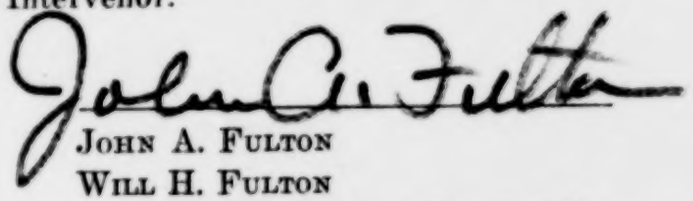
Of Counsel:

WOODWARD, HOBSON & FULTON

January 18, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of January, 1977, three copies of this Supplemental Brief in Support of Petition for Writ of Certiorari were hand delivered to: Mr. Thomas Hogan, 701 W. Walnut Street, Louisville, Kentucky, Counsel for Respondent; Mr. Henry A. Triplett, 231 S. Fifth Street, Louisville, Kentucky; and Mr. J. Bruce Miller, 1112 Kentucky Home Life Building, Louisville, Kentucky, Counsel for Intervenor.



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ADDENDUM

ADDENDUM

UNITED STATES SUPREME COURT

76-200

AUSTIN INDEPENDENT SCHOOL DISTRICT

v.

U. S., PER CURIAM

The petition for certiorari is granted, the judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for reconsideration in light of Washington v. Davis, 426 U. S. 229 (1976).

Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist join, concurring.

I concur in the action of the Court, and agree that there would be no need to address the issue of remedy if the Court of Appeals upon reconsideration of its opinion in light of Washington v. Davis, 426 U. S. 229 (1976), should conclude that there was no constitutional violation. I would nonetheless include the issue of remedy in the remand order because of what appears to be a misapplication of a core principle of desegregation cases. In such cases, this Court has repeatedly emphasized that:

> **"the task is to correct by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation'**

and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'" Milliken v. Bradley, 418 U. S. 717, 738 (1974), quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 16 (1971).

As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.[1] That court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights.

As is true in most of our larger cities with substantial minority populations, Austin has residential areas in which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city.

Acknowledging these difficulties, the Court of Appeals, noted that:

"[c]ountless efforts by school officials, consultants, and visiting teams have found it impossible to produce

[1]Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, e.g., United States v. Texas Education Agency, 467 F. 2d 848, 865-869 (CA 5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools:

> "At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of Brown as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent." App. to Pet. for Cert., at 20.

> significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of cross-town busing incident to non-contiguous pairing of . . . schools. . . ." App. to Pet. for Cert., at 26.

The Court of Appeals then concluded that nothing short of extensive cross-town transportation would suffice.

Designed to achieve a degree of racial balance in every school in Austin,[2] the desegregation plan endorsed by the Court of Appeals is remarkably sweeping. For kindergarten through eighth grade, the plan requires cross-town busing of all students in schools that are over 50% minority or 90% Anglo.[3] For kindergarten through fourth grade,

[2]Apparently misconceiving the import of language in Green v. County School Board of New Kent County, 391 U. S. 430, 442 (1968), to the effect that there should be no "Negro" school or "white" school, the Court of Appeals seems to believe every school must be racially balanced to some degree. Green involved a rural, sparsely populated county with only two schools. Much of its language is irrelevant to a large urban school system. Moreover, the effect of applying the language of Green to such a system may be to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. The Solicitor General, speaking for the United States in this case, commented that "there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action." Brief for the United States, at 8 n. 5.

[3]This "triggering" condition of the plan requires further comment. Describing it, the Court of Appeals stated as follows:

> "Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as 'naturally desegregated' and would remain unchanged. *When changing demographic patterns cause any of these schools to fall outside of the 'naturally desegregated' range, the schools would be brought within the Finger Plan 4-4-4 system.*" App. to Pet. for Cert., at 28 (emphasis added).

This aspect of the plan clearly reveals that the plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding Pasadena City Board of Education v. Spangler, ___ U. S. ___ (1976).

the students in East Austin attending the relevant schools will be bused through the congested center of the city to West Austin. For fourth through eighth grade, the flow will be reversed. The high schools will be integrated by a system of "feeder" schools. This plan requiring transportation of from 18,600 to 25,000 students, consisting of from 32% to 42% of the entire school population,[4] was ordered despite the District Court's conclusion that such a plan would involve a "risk to health and probable impingement of education for students younger than the sixth grade. . . ." App. to Pet. for Cert., at 53.

Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation, see Keyes v. School District No. 1, Denver, Colorado, 413 U. S. 189, 217-253 (1973), (Powell, J., concurring in part and dissenting in part), the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts of omissions. The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was co-extensive with the constitutional violations, it adopted a view of the constitutional obligations of

[4]In defending the high percentage of children proposed to be bused in Austin, the Court of Appeals relied on superficially comparable percentages of children that were to be transported under the plan approved in Swann. The school district before the Court in Swann included Mecklenberg County as well as the city of Charlotte. As the Court said: "The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south." 402 U. S. at 6. Although it included a metropolitan area, much of the district was rural, requiring the transportation of pupils quite apart from desegregation efforts. Because of this situation in Swann, it is unduly simplistic to compare the percentages of children bused. The situation in Austin is simply not comparable.

a school board far exceeding anything required by this Court.

The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences[5] are the primary determinants of residential patterns.

I do not suggest that transportation of pupils is never a permissible means of implementing desegregation.[6] I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children.[7] A

[5]See Keyes, 413 U. S. at 224-253 (Powell, J., concurring in part and dissenting in part). The tendency of citizens of common national or ethnic origins to form homogeneous residential patterns in our cities is a familiar demographic characteristic of this country.

[6]See id., at 242-252.

[7]A related equitable principle, also applicable in fashioning a desegregation remedy, is that a court has the duty to "balanc[e] . . . the individual and collective interests." Milliken v. Bradley, 418 U. S., at 738. The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children—especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather upon innocent children and parents.

remedy simply is not equitable if it is disproportionate to the wrong.

Mr. Justice Brennan and Mr. Justice Marshall dissent because they are persuaded that the Court of Appeals correctly interpreted and applied the relevant decisions of this Court.

Supreme Court, U. S.
FILED
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AK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-710

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and
ERNEST GRAYSON - - - - - - Petitioners

versus

NEWBURG AREA COUNCIL, INC.,
SARAH WHITE,
JOHNIE WRIGHT and
SUZANNE POST - - - - - - Respondents

AND

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY and
BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - Petitioners

versus

JOHN E. HAYCRAFT and
HAZEL K. LANE - - - - - - Respondents

(Other parties respondent on inside cover)

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents in Board of Education v. Newburg:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County and Board of Education of Louisville versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

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ORDER DIRECTING THE FILING OF A PLAN OF DESEGREGATION, MARCH 31, 1975

UNITED STATES DISTRICT COURT

Western District of Kentucky
At Louisville

NEWBURG AREA COUNCIL, INC., et al. - - *Plaintiffs*

v. **Civil Action 7045**

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - - - - *Defendants*

JOHN E. HAYCRAFT, et al. - - - - - *Plaintiffs*

v. **Civil Action 7291**

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al. - - - - - - - *Defendants*

ORDER—Entered March 31, 1975

This cause coming on to be heard on the motion of the Board of Education of Jefferson County, Kentucky as constituted prior to April 1, 1975, and the Board of Education of Louisville, Kentucky as constituted prior to April 1, 1975, requesting the Court to clarify or modify its Memorandum Opinion and Order of January 30, 1975, entered herein for the purpose of instructing the merged Board how to proceed, and it appearing that:

(1) On the 28th of February, 1975, the State Board of Education of the Commonwealth of Kentucky in the manner prescribed by state law and later reaffirmed by its Order of the 27th day of March, 1975, ordered the two districts (the Louisville Independent District and the Jefferson County District) merged into one school district, to be

known as the Board of Education of Jefferson County, Kentucky, and provided that all five members of each school board as presently constituted should compose the school board of the merged district;

(2) The respective boards as presently constituted before the effective date of merger desire instruction of the Court as to how to proceed under this Court's Memorandum Opinion and Order of January 30, 1975;

(3) The Board of Education of Louisville, Kentucky and the Board of Education of Jefferson County, Kentucky as constituted prior to April 1, 1975, have held and maintained throughout this litigation different views and positions as to the type and nature of the desegregation plan this Court should order, if any;

(4) This Court has sought throughout this litigation to arrive at a desegregation plan which would comply in all respects with the Constitution and has welcomed all responsible suggestions concerning same, and that at the previous hearings herein permitted both Boards and the Plaintiffs to submit whatever material each believed would best accomplish this Court's responsibilities;

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that:

(1) The Board of Education of Jefferson County, Kentucky as constituted prior to April 1, 1975, shall file with this Court no later than April 30, 1975, a desegregation plan devised by it in compliance with this Court's Memorandum Opinion and Order of January 30, 1975, as modified herein;

(2) The Board of Education of Louisville, Kentucky as constituted prior to April 1, 1975, may file with this Court, within 30 days after April 30, 1975, or any time prior thereto, any desegregation plan which it conceives to be in compliance with this Court's Memorandum Opinion and Order of January 30, 1975, as modified herein;

(3) The Plaintiffs may file with the Court such desegregation plan or such suggestions or modifications to either of the desegregation plans set forth in (1) and (2) above, as they may be advised within 30 days after April 30, 1975;

(4) It is the intention and purpose of this Court that the parties hereto, the Board of Education of Jefferson County, Kentucky as constituted prior to April 1, 1975, and the Board of Education of Louisville, Kentucky as constituted prior to April 1, 1975, shall, for the purposes of this litigation only, and until final Order of this Court has been rendered, retain their legal identities;

(5) In the event that the Board of Education of Jefferson County, Kentucky as it was constituted before April 1, 1975, or the Board of Education of Louisville, Kentucky as it was constituted before April 1, 1975, shall be dissatisfied with any Orders of this Court, such legal entity shall be permitted to appeal from such Order, notwithstanding the Order of the Kentucky State Board of Education of February 28, 1975, as modified March 27, 1975.

March 31, 1975

(s) James F. Gordon
United States District Judge

Copies to:
Counsel of record.

PROPOSED DESEGREGATION PLAN PURSUANT TO ORDER OF JANUARY 29, 1975 AS MODIFIED MARCH 31, 1975 (JET PLAN, FILED APRIL 30, 1975 SOME EXHIBITS OMITTED)

MAY IT PLEASE THE COURT:

PREAMBLE

Following the decision of the Sixth Circuit Court of Appeals December 11, 1974, in which that Court interpreted the Milliken decision of the Supreme Court of the United States and reinstated its Opinion of December 28, 1973, with certain modifications directing the district court to approve a desegregation plan that would eliminate all vestiges of state-imposed segregation, the plaintiffs in this action moved the Court to reinstate its Judgment of July 24, 1974, in which the Court had adopted a desegregation plan entitled Plan X and ordered its implementation. On January 25, 1975, this court in its "Memorandum Opinion and Order" rehearsed the proceedings pending in this Court since 1971, identified the positions of the various parties plaintiff, the Jefferson County Board of Education and Louisville Board of Education, and directed the Jefferson County Board to undertake to prepare a desegregation plan which would comply with the congressional amendments to the Educational Acts of 1974 and also the obligation of the Court under the mandate of the Sixth Circuit Court of Appeals and the Supreme Court of the United States to accomplish the orderly removal of any vestiges of a dual school system which had previously existed in the view of the Sixth Circuit Court of Appeals. This Court was careful to provide that the desegregation plan thus submitted not only comply with the guidelines contained in the Congressional amendments of 1974, but at the same time meet the Court's constitutional responsibility to the plaintiffs and the children of Jefferson County.

The Jefferson County Board of Education was directed to file not later than April 30, a desegregation plan prepared without regard to existing school district lines, and incorporating the provisions of this Court's Judgment of 1974 relative to implementation of the plan. The Court then permitted the Louisville Board of Education, the plaintiffs, and any other parties to file objections within 30 days or such alternative plan or plans as the parties saw fit consistent with the views set forth in the Court's Opinion of January 29, 1975.

At the time the Court's January 29, 1975, Order was entered there were pending proceedings before the State Board of Education looking to a merger of the Louisville Independent School District and the Jefferson County School District. This merger, accomplished under Kentucky statutes enacted in 1974 for the merger of the two districts, became effective April 1, 1975. The present Jefferson County Board of Education consists of ten members, five of whom were formerly elected to the Louisville Independent school board and five of whom were elected to the Jefferson County school board. The Court is aware of the fact that throughout this litigation there has been a significant difference in the viewpoints of the two original boards on the subject of an appropriate desegregation plan and that these differences have been asserted in the various pleadings in this Court and throughout the litigation on appeal. The primary difference in philosophy between the boards relates to the extent and degree of pupil reassignment required to create an educationally sound and administratively feasible desegregation plan which will enable this Court to comply with its responsibilities to fashion a remedy for the unconstitutional segregation of children in Jefferson County which the Sixth Circuit Court of Appeals determined to exist in its two opinions.

The Supreme Court of the United States, on April 21, 1975, denied petitions for certiorari filed by both school

boards. Each board claimed that the school district which it represented was a unitary system and did not violate the constitutional rights of children in the district to equal educational opportunity without regard to race, color, sex or national origin. The denial of certiorari by the Supreme Court of the United States removes this question from further consideration by this Court and leaves solely the question of an appropriate remedy for the elimination of the vestiges of dual school systems which the Sixth Circuit Court of Appeals found to exist in Jefferson County, Kentucky. The Congress, in the Equal Educational Opportunity Act of 1974, determined that it was necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems without modifying or diminishing the authority of the courts of the United States to enforce fully the Fifth and the Fourteenth Amendments to the Constitution of the United States.

This Court recognized the difference in philosophy of the two former school boards in its Order of January 19, 1975, as modified March 31, 1975, by providing that both boards should have an opportunity to submit plans containing specific remedies for the elimination of the vestiges of the dual school systems. In order to accomplish this the Court provided that each of the boards, as well as the plaintiffs, might submit their views as to an appropriate desegregation plan and provided that the boards should retain their legal identities solely for the purpose of this litigation.

Throughout this litigation the Jefferson County Board of Education has endeavored to make it apparent that the filing of various desegregation plans was solely for the purpose of complying with the orders of this Court and that such plans did not necessarily reflect the educational policy

of the board. It is perhaps necessary to reiterate this position at this point in order that the Board may specifically reserve its right to appeal from the action of this Court adopting *any* plan of desegregation involving the school district which the Board considers to impose requirements or remedies in excess of those required by statutory and case law. This caveat is required solely because of the fact that during the appellate procedures the plaintiffs in this litigation have urged that the mere filing of a desegregation plan constituted a statement of the Board's educational policy which prevented it from maintaining its legal position on appeal.

I. DEFINITIONS

Certain words, terms or phrases used in this plan repeatedly may have a special or technical meaning, particularly to the professional staff engaged in the preparation of this plan and to school officials and administrators generally. These words or phrases are defined below for clarity and for the assistance of the Court.

1. *Jefferson County School District*—The Jefferson County School District is that geographic area contained within the boundaries of Jefferson County, Kentucky, which serves public school students residing therein with the exception of the geographical area and the students residing within the boundaries of the Anchorage Independent School District.

2. *Subdistrict Attendance Area*—A Subdistrict Attendance Area consists of a geographic area defined by an artificially established boundary line created administratively for the purpose of the school assignment of pupils living within a particular geographic area. Public school pupils living within the defined area are assigned to and will attend the subdistrict school which contains the appropriate grade level for each pupil.

3. *Barriers*—Natural and artificial Barriers such as creeks, arterial highways, industrial complexes, parks, cemeteries, railroads and certain subdivision street conformations directly affect administrative decisions in delineating sub-district attendance areas.

4. *School Capacity*—School Capacity is a numerical enrollment figure for a particular school building which is administratively feasible and is determined by the number of classrooms and the type of program offered in a particular school building. Generally, in a building with a regular school program, 25 to 30 pupils are assigned to a classroom, but administrative decisions including federal guidelines restricting class size or special educational programs requiring numerically smaller classes may reduce the "seating capacity."

5. *Closest School*—Closest School as that term is used in the Equal Educational Opportunity Acts of 1974, Title 20 S1714 and in this desegregation plan refers to the "crow flight" or straight line distance from a pupil's home to the nearest school building containing the appropriate grade for such pupil. Basically, the closest school has been determined for each pupil by means of computer coordinates. In practice, the determination of the closest school depends upon the geographic factors involved in the travel distance between a pupil's residence and the school offering the appropriate grade level and type of instruction, taking into account the capacity of the school involved.

6. *Next Closest School*—The term Next Closest School as used in Section 1714 of Title 20, Equal Educational Opportunities Act, as interpreted by this desegregation plan refers to the "crow flight" or straight line distance from a pupil's residence to the appropriate school building which offers the appropriate grade level and type of instruction for that pupil, taking into account the capacity of the school involved, which is nearest the pupil's residence if

the Closest School defined above is eliminated. The Next Closest School may also be determined precisely by means of computer coordinates. Practically, geographic factors which affect the travel distance between the pupil's residence and the school building are taken into account and generally, a formula of multiplying straight line distance by a factor of 1.25 will provide a reliable estimate of actual travel distance.

7. *Home School*—A Home School is the school building closest or next closest to the pupil's place of residence which offers an appropriate grade level and to which the pupil is administratively assigned during a particular school year. Generally, it is the school building to which the pupil will report each morning and to which he will return each afternoon even though the pupil may be transported to an Away School for a major portion of the day's instruction.

8. *Away School*—A pupil's Away School is considered to be a school other than the Home School to which a particular pupil may be assigned during any part of the school day. The Away School also offers the appropriate grade level and type of instruction for a pupil so assigned and is administratively selected on the basis of its racial composition for the purposes of this desegregation plan.

9. *School Day*—The School Day as used in this desegregation plan and defined by KRS 158.060 consists of six hours of actual school work.

10. *Grade Structure*—Grade Structure refers to the administrative classification of schools as elementary, middle and senior high schools. At present there is varying Grade Structure in the Jefferson County school system and the former Louisville Independent school system. Schools presently are classified as elementary, middle, junior and senior high schools. Some elementary schools include Headstart, kindergarten and grades 1 to 6. Other elementary schools include grades 1 to 5. Middle schools generally include

grades 6 through 8, although one middle school now in use provides only for grades 7 and 8. Junior high schools generally contain either grades 7-8 or 7-9. High schools are made up of either grades 9-12 or 10-12. As a result of the merger of the two school systems, it is contemplated that a uniform grade structure consisting of elementary schools containing grades 1-5 or kindergarten-5, middle schools with grades 6, 7, and 8 and high school with grades 9-12 will be accomplished. Reclassification of some school buildings with accompanying physical plant modifications will be required to achieve uniformity of Grade Structure throughout the school system.

11. *Reclassification*—Reclassification is the process of rearranging the Grade Structure of particular schools. In cases where high school's capacity permits addition of a grade the school historically containing grades 10-12 could accommodate grades 9-12. A junior high school can be reclassified as a middle school by moving the 9th grade of that former junior high school to an adjacent high school building and adding a sixth grade from an elementary school to the former junior high school. An elementary school may be utilized as a middle school by adding physical facilities for shop, home economics and physical education (gymnasium). In addition to structural changes, when a school is reclassified program adjustments are required to accommodate the new grade structure. Eventually elementary schools can house pupils in grades 1-5 or kindergarten through 5 when sufficient middle school Reclassification takes place to absorb the present sixth grades in most elementary schools.

12. *Quarter*—The Jefferson County School District's school year is divided into four Quarters of approximately 60 days each. Kentucky statutes require attendance of pupils during three of four Quarters.

13. *Elective Quarter Plan*—A pupil may elect to attend any three of the four Quarters (fall, winter, spring or summer). The fall Quarter, generally beginning in late August, is considered the beginning of the school year. Tuition is not required of pupils attending three Quarters in any one school year. In the event a student elects to attend four consecutive Quarters, tuition is assessed. The tuition is based upon the division of the state costs and the local costs of a Quarter's attendance. A pupil is required to pay as tuition that portion of the cost customarily provided by the state during Quarters of compulsory attendance. The school district provides for the remaining cost of a pupil's fourth Quarter from local funds.

14. *Activities—Extra-Curricular*—Extra-curricular Activities are those school-related activities which are scheduled and occur preceding or following the school day. Participation is voluntary. These activities include, but are not restricted to, athletic teams, drill corps, cheerleading and any other activities not engaged in during the regular school day. A letter or award is usually given for such activities.

15. *Activities—Co-Curricular*—Co-curricular Activities are those directly connected with the instructional program and may occur preceding, during or after the regular school day. Participation is generally based upon the academic achievement of the pupil or instructional courses selected. Examples are language clubs, student council, Beta Club, National Honor Society, school publications, dramatics and others.

16. *Advanced Program*—The Advanced Program is a course of instruction designed for students who demonstrate certain traits of maturity, intelligence, motivation, achievement and academic proficiency.

17. *Basic Subjects*—Basic Subjects include the language arts (listening, speaking, reading, writing, composi-

tion and penmanship, spelling, and literature) and mathematics. These subjects are essential to a foundation required for academic progress leading to a high school diploma.

18. *Computer Scheduling*—Computer Scheduling is a method of scheduling which permits the principal to build a master schedule and efficiently assign pupils to classes previously selected from an extensive list of course offerings. Computer scheduling makes for a more efficient system of teacher assignment.

19. *Certificated Employees*—Certificated Employees are those employees of the Jefferson County school system who have completed the requirements specified in KRS 161.020, et seq., and have secured state certification for the position for which they are employed.

20. *Non-Certificated Employees*—Non-certificated Employees of the Jefferson County Board of Education are those employees who are not required to obtain a state certificate for employment in the position they occupy, but who must meet requirements established for their employment by the Jefferson County Board of Education.

21. *Paraprofessionals*—Paraprofessionals are uncertificated personnel who receive special training to enable them to assist teachers with classroom procedures.

22. *Team Teaching*—Team Teaching is the activity of two or more teachers in instructing the same group of students utilizing each teacher's individual skills for the benefit of the students.

23. *School Grouping*—School Groupings are the administrative designation of two or more schools of comparable classification selected to facilitate pupil exchange and efficient transportation in the JET Program.

24. *J E T*—JET is the designation for Jefferson Educational Trip, an instructionally oriented exchange of students between schools of similar classification, utilizing vehicles equipped with sound systems. At the elementary school level a teacher accompanies the pupils in a class for the purpose of instruction and general supervision. At the middle and high school levels, either a teacher, a Paraprofessional or a study hall monitor accompanies the pupils.

25. *Magnet School*—A Magnet School is a specialized school which provides programs in selected areas such as science, visual and performing arts or vocational education. The types of courses offered and the faculty of a Magnet School permit students with special interests to pursue a course of training beyond that offered in the general courses in regular middle or high school programs. Students are selected from the entire school district after appropriate evaluation for enrollment.

26. *Census Tract and Block*—Census Tracts are geographic areas of varying sizes and shapes drawn up by the Geographic Operations Branch of the Data Preparation Division, U. S. Bureau of the Census, and approved by the Geography Division in Washington, D. C. A Census Block is a subdivision of a Census Tract. Population characteristics are compiled from Block and Tract data.

II. INSTRUCTION AND CURRICULUM

Educational philosophies of the former Louisville Independent School District were compatible with educational philosophies of the Jefferson County School District in the area of curriculum and instruction. As a result of merger, the Elective Quarter Plan and the courses and curriculum guides used in conjunction with this method of structuring the school year and instructional program will be used throughout the Jefferson County School District beginning with the fall Quarter of 1975. Planning has been underway for several months to provide all students with the advantages of this program.

It is proposed that the senior class during the first year of implementation of this plan be excluded from consideration for transportation between schools and that the seniors be permitted to attend the home school to which each senior pupil is assigned for the first year of the implementation of this plan only. Involuntary participation in the exchange proposal during the first year of implementation of this plan might unreasonably interfere with fulfillment of graduation requirements for some seniors due to the special nature of the courses which the pupils have previously selected. For this reason, during the first year of the implementation of this program, it is suggested that senior pupils be permitted to participate in the exchange program if they wish but that such participation be entirely voluntary and that the number of exchange students from the senior class be subject to administrative decisions necessary to carry out the pupil assignment methodology described in this plan.

Special Schools and Programs Excluded From Exchange Program

It is proposed that pupils in the Headstart and kindergarten programs and first grade pupils be excluded from the exchange program of this plan and that such students be assigned only to the Home School. The tender age of these children and the necessity to adjust to the routines of a school setting for the first time indicates that exclusion of these pupils from an exchange program is not only administratively feasible, but educationally sound.

Vocational Rehabilitation schools, state and local government institutional schools, deaf-oral classes, orthopedically handicapped classes, emotionally disturbed classes, Youth Development and alternative schools, and trainable classes, and any other programs requiring special equipment and housing shall be excluded from the exchange program.

Advanced Program

Pupils who qualify for and elect enrollment in the Advanced Program as defined herein should be included in any desegregation plan of this court. Pupils in the Advanced Program selected for exchange in accordance with the provisions of the Pupil Assignment Method of this desegregation plan would be provided with the same course offerings at their Away School as at their Home School. Provision will be made for offering the Advanced Program throughout the metropolitan area by an equitable distribution of the schools offering the Advanced Program.

Co-Curricular Activities

Co-Curricular Activities as defined in this plan permit the pupils involved in the daily school program of formal instruction to engage in these activities whether at the Home School or the Away School.

Faculty and Staff

Certificated Staff who work directly with children in the schools will be assigned so that as far as possible the racial composition of a specific school staff would not indicate that the school is intended exclusively for black pupils or for white pupils. Insofar as possible, assignment of principals and teachers will be made so that the ratio of Certificated Staff *in a particular school* is roughly equivalent to the black-white staff ratio system wide. The following guidelines with respect to the assignment of faculty and staff will be observed:

A. Certificated Staff members who work directly with children and Certificated Staff at the administrative level will be employed, promoted, paid, demoted and dismissed in an equitable manner without regard to sex, race, color, or national origin. Black teachers and supportive staff such

as counselors and all categories of administrative staff shall be assigned in all areas of the school program.

B. Whenever it appears that the racial composition of the combined staffs of the two systems is disconsonant with the system-wide *pupil* racial composition, every effort will be made in employment and promotion to alleviate this condition. If there is to be a reduction in the number of principals, teachers, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff members to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through the recruitment of a person of a race or national origin different from that of the individual dismissed or demoted unless each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Merger of the former Louisville Independent District with the Jefferson County School District will require equalization of pay and benefits and the adoption of uniform policies relative to faculty and staff.

In order to facilitate the implementation of the necessary teacher assignment policy outlined above in an equitable manner, consideration will be given to the following variables:

1. Preparation; 2. Experience; 3. Certification; 4. Tenure; and 5. Willingness to volunteer for majority-to-minority transfer.

In effecting teacher transfer, the following procedures will be used to the extent possible:

1. Determination of the number of teachers needed in each school by race; 2. Notification of all teachers of the needs of each individual school; 3. Encouragement of teachers to indicate three choices for voluntary transfer; 4. The

implications of seniority; 5. The consideration of other factors such as the recommendation of principals, the need for transfer to the same grade level as in present assignment and the transfer of secondary teachers to a subject area within their expertise, etc.; 6. Bi-racial administrative staffs will be assigned to the following areas, central office staff, local schools and special programs.

It is believed that whatever pupil assignment method and desegregation plan is finally adopted by the Court, the assignment of faculty and staff will be dictated by a formula approved by the courts in the *Singleton* decision and this desegregation plan proposes that that formula be followed.

III. PUPIL ASSIGNMENT

A. Compliance with the Equal Educational Opportunity Acts of 1974

In undertaking to formulate a desegregation plan pursuant to this Court's order of January 29, 1975, the Jefferson County Board of Education recognized its duty to adhere strictly to the congressional directive found in the Equal Educational Opportunities Act of 1974, 20 U.S.C. S1701, et seq. The formulation of the desegregation plan set out herein of necessity was prepared to conform with 20 U.S.C. S1701, 1703-05 and 1712-14 with particular attention being directed to the priority of remedies provision of 20 U.S.C. S1713 which is set out in full below for the benefit of the Court. Other relevant provisions of said Act are attached hereto as Exhibit 1.

20 U.S.C. 1713. Priority of Remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make

specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

The Board of Education of Jefferson County, Kentucky, must advise the Court in the exercise of good faith that its legal position with respect to 20 U.S.C. S1713 is that no

single subsection of said provision provides an adequate remedy for the constitutional violation determined by the Sixth Circuit Court of Appeals in its opinions of December 28, 1973, and December 11, 1974 (*certiorari denied,* 43 U.S.L.W. 3571, April 21, 1975). As will be developed hereinafter, it is the position of the Board of Education of Jefferson County, Kentucky, that a combination of the remedies outlined by 20 U.S.C. S1713 is required to adequately remedy the violations mentioned above.

In obtaining compliance with 20 U.S.C. S1713(a)-(f) it was determined ab initio that the utilization of subsection (e), to the extent that it directs the construction of new schools and subsection (f) could not be utilized in a plan of desegregation not only because of the strictures of time but because such construction is not necessary because of declining enrollment. There are facilities in the Jefferson County school system which are considered Magnet Schools and their existence was utilized to the greatest extent possible for the purposes of the preparation of this plan. Magnet Schools might well be established by the Jefferson County school system, but as a practical matter, establishment of additional such schools for initial implementation of a desegregation plan in accordance with this Court's order is not feasible in the short term. The Jefferson County Board is undertaking an examination into the further development of Magnet Schools and can report upon this inquiry to the Court from time to time.

The primary tools for desegregation utilized by this plan for the purposes of compliance with 20 U.S.C. S1713 are subsection (a), (b), (d) and (e) of that section. Utilizing Census Block and Tract data and school records, an initial determination was made of the residence, age, grade, school and race of all public school children in Jefferson County, Kentucky, for the 1974-75 school year. Building upon this data base, it was then determined which school offering the appropriate grade level and type of education

for each such student was the physically closest school operated by the Jefferson County School District, taking into account (1) School Capacities and (2) natural physical Barriers.

A similar function was performed to determine the Closest School operated by the Jefferson County School District to each such student, taking into account *only* School Capacities. Once this material has been collated, a determination of the racial composition of every school was made assuming that students who lived closest to the school would attend that school. This cumulation was necessarily bounded by the capacity of each school. In performing this function and for all other purposes in this section, presently recognized school Subdistrict Attendance areas were completely disregarded, and any dislocations brought about by the Open Transfer Policy of the former Louisville Independent District were also corrected.

The result of this examination of the racial composition of all schools in the school system revealed few changes except for example in the northcentral and northwestern sections of the Jefferson County School District. The committee preparing this plan then proceeded to reformulate all Subdistrict Attendance Areas based on the following criteria:

(1) no student would be required to attend a school more distant from his place of residence than the Closest or Next Closest school offering the appropriate grade level and type of education for such student; (2) *wherever possible,* schools that were not in conformity with a Grade Structure of grades 1 through 5 or K-5 for elementary schools, grades 6-8 for middle schools, and grades 9-12 for high schools were reclassified to conform with such Grade Structure; (3) selective school closings were made to reflect the overall decline in enrollment throughout the system and diminution in usefulness of some physical plants presently under-utilized. All such closings were carefully

scrutinized to effect, wherever possible, a useful change in racial composition of the school Subdistrict Attendance Areas in the immediate vicinity of the schools selected to be closed. Exhibit 16 shows all such proposed closings; (4) Reclassification of some schools was effected (and Reclassification of numerous others will be proposed over the next several years) to broaden the geographical reach of that school's Subdistrict Area and to contribute to desegregative aspects of that school's racial composition; (5) during the reformulation of school Subdistrict Attendance Areas, practicalities of efficient pupil transportation and the effect of Barriers upon transportation routes were continually kept in mind; (6) foregoing guidelines are subject to the criterion that an attempt would be made to establish school Subdistrict Attendance Areas resulting in pupil racial composition of no less than 10% black pupils and no more than 50% black pupils in each school.

Utilizing the aforementioned criterion for the redrawing of school Subdistrict Attendance Areas, many changes were made in the present Subdistrict Attendance Areas utilized by the Jefferson County School District. Exhibit 2 lists alphabetically all elementary, middle and junior and high schools presently in operation in the Jefferson County School System. Page 1 of the Exhibit gives a summary of the September, 1974, enrollment in the Jefferson County School System indicating the type of schools such pupils attend and the racial composition of each type of school as well as the total enrollment of the system and its overall racial composition for the 1974-75 school year.

The balance of Exhibit 2 lists alphabetically each school presently operated by the Jefferson County School System with the total number of white and black children in each school, the total membership of the school and its overall racial composition. In schools managed and controlled by the former Louisville Board of Education at the beginning of the 1974-75 school year, these figures reflect the Open

Transfer Policy Figures for each school managed and controlled by the five-member Jefferson County Board of Education at the beginning of the 1974-75 school year, reflect total membership and overall racial composition as a result of school assignment by subdistrict residence.

Exhibits 3 through 5 show, among other things, the racial composition of each school in the Jefferson County School System after the application of the criteria enumerated above for the reformulation of all school Subdistrict Attendance Areas. This information for elementary schools is found in Exhibit 3, column 7, for middle schools in Exhibit 4 column 6 and for high schools in Exhibit 5 column 4. The data contained in such columns reflects school closings, Reclassifications and all reformulations of Subdistrict Attendance Areas.

An examination of Exhibits 2-5 reveals, for example, that the racial composition of Male High School, located in a northcentral section of the Jefferson County School District, was reduced from 98% black to 43.5% black. Similarly, the racial composition of Ahrens High School was reduced from 39% black to 26.2% black after the application of the Equal Educational Opportunity Act guidelines.

The new Subdistrict Attendance Areas reflected by the data contained in Exhibits 3-5 have not yet been reduced to a form which can readily be filed with the Court, but this data will be made available to any interested parties in the litigation at the Richard VanHoose Education Center until such time as the data can be filed with the Court as a matter of record herein. It is anticipated that this data cannot be filed with Court for between 30 to 60 days. In no event will such material be filed with the Court at a time later than ten days prior to the hearing herein on the merits of any plans filed pursuant to the Court's order of January 29, 1975.

B. An Additional Pupil Assignment Plan—JET

It is the position of the Jefferson County Board of Education that the previously outlined remedial steps and the resulting racial compositions in various schools throughout the system reflected by Exhibits 3 through 5, columns 7, 6 and 4 respectively, not only conform with the congressional directive of the Equal Educational Opportunity Act of 1974 (20 U.S.C. S1701, et seq.), but also that the application of such remedial steps brings the school system into full compliance with the Opinions of the United States Court of Appeals for the Sixth Circuit rendered December 28, 1973, and December 11, 1974.

It is the position of the Jefferson County Board of Education that the requirement of any additional remedial action to comply with the Order of this Court would not only violate the strictures of the Equal Educational Opportunity Act of 1974, and in particular, 20 U.S.C. S1713-1715, but would also require of the Jefferson County Board of Education a remedy disproportionate to the violation in question, thus needlessly disregarding the directive of Chief Justice Burger in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971). "As with any equity case, the nature of the violation determines the scope of the remedy." 402 U. S. 1, 16. The Board of Education of Jefferson County, Kentucky, respectfully submits that the remedial measures previously outlined sufficiently remedy the violation in question, while keeping in mind the necessity for careful balancing of the individual and collective interests involved. 402 U. S. 1, 16.

The additional remedy outlined in this Subsection is (as is the entirety of this proposed desegregation plan) presented by the Board of Education of Jefferson County, Kentucky, solely under compulsion of law in compliance with this Court's order of January 29, 1975, as set out in detail in the Preamble hereinabove. The Board of Education of

Jefferson County, Kentucky, proposes the JET remedy set forth herein not as an indication of its educational policy but only as an alternative to be considered by the Court should it make an express determination that the steps outlined previously in conformity with the Equal Educational Opportunity Act of 1974 are insufficient to remedy the violations denominated by the Court of Appeals.

In formulating the JET remedy, two principal criteria were utilized. The foremost criterion is that contained in 20 U.S.C. S1713(g) which mandates that any remedy not specifically enumerated in its other Subsections must ab initio meet the test of being "educationally sound and administratively feasible." The second primary criterion utilized during the formation of the JET remedy was the anticipation of any criticisms this Court might have of the racial compositions of the various schools in the Jefferson County School District which resulted from the application of the remedies enumerated in 20 U.S.C. S1713(a-f) outlined hereinabove in Subsection A. In this regard the JET remedy focused primarily on schools which still had a black racial composition in excess of 50% or white racial composition in excess of 90%.

Several curriculum-related assumptions were made at the beginning of the conceptualization of the JET remedy. It was determined that during the first year of implementation all seniors would be exempted from the JET plan. Curriculum-related problems concerning matriculation of this group of pupils necessitate this step as the merger of the two previous districts and other problems have resulted in certain curriculum disparities among various schools within the Jefferson County School District. It is also felt that this exemption would allow the retention at each high school of a stable group which could provide the necessary leadership for an orderly implementation of a desegregation plan in its critical early stages.

As the Jefferson County School District presently operates only a limited number of kindergarten facilities, the JET plan contemplates the exemption of first graders at least until such time as a sufficient number of kindergartens are in operation that a group of school-experienced first graders could be identified. Upon the identification of such group, there is no compelling reason why the JET remedy could not be extended to their number. For children without any previous school experience prior to the entry into the first grade an exemption from involvement in the JET plan is dictated not only by sound educational policy but by common sense as well.

All the data illustrated in the Exhibits attached hereto concerning the pupil reassignments involved under the JET plan reflect the exemption of all first graders and all seniors. It should be noted that the exemption for seniors is proposed for the first year of implementation only and that the proposed exemption for first graders would only be applicable until such time as a sufficient number of kindergartens are in operation as to eliminate the problems involved with the first formal school experience of a young child.

The first step taken in the development of the JET plan was to identify schools to be exempted from its operation on the basis of their racial compositions after the application of the remedies enumerated in Section II-A hereinabove. Exhibit 12 identifies the elementary schools in the Jefferson County School District which qualified for exemption from the JET plan.

The shaded dots on the Exhibit indicate the locations of all such exempted schools, and next to each such dot is the name of the school and its racial composition. Exhibits 13 and 14 portray similar information for the middle schools and high schools in the Jefferson County School District. Racial compositions of exempted elementary

schools ranges from 10% black to 48.7% black. Racial compositions of exempted middle schools ranges from 12.7% black to 37.4% black and racial compositions of exempted high schools ranges from 26.2% black to 43.5% black.

All remaining schools in the Jefferson County School District are involved to some degree in the JET plan. The Home Schools for students residing in the Subdistrict Attendance Areas of the non-exempted schools were designated by establishment of school Subdistrict Attendance Areas for *all* schools in the Jefferson County School District pursuant to the guidelines in Section III-A. Thus, a student's Home School is the appropriate school contained within the school Subdistrict Attendance Area within which the student resides regardless of whether or not such school is exempted from the JET plan. The denomination of a Home School as the theoretical underpinning of the JET plan is designed to exact conformity with the congressional policy evidenced by 20 U.S.C. S1701, 1705, and 1713-1715, as well as the congressional policy evidenced specifically by 20 U.S.C. S1713(g) requiring that any desegregation remedy ordered by this Court be "educationally sound and administratively feasible." Further, it is the educational policy of the Board of Education of Jefferson, Kentucky, that the concept of the Home School is indeed the most educationally sound and administratively feasible basis for compliance with the Board's duty to provide an equal educational opportunity for each pupil in the system of public schools in Jefferson County, Kentucky, and as such, should be utilized to the fullest extent possible.

At the elementary school level, the JET plan is designed to deal with classroom units of pupils and specific grade levels at a school involved in the plan rather than individual pupils per se. An exception to this overall approach is envisioned for majority-to-minority transfers. This concept will be discussed in greater detail in Section III-C.

Having once determined that a particular elementary school would necessarily be involved in the JET plan, School Groupings were made whereby a predominantly black elementary school was grouped with one or more predominantly white elementary schools. Disparity in numbers of pupils enrolled precludes matching individual schools on a one-to-one basis. The major criteria for determining schools in a particular School Grouping were: (1) the geographic location of each school; (2) the capacity of each school; (3) the racial composition of each school prior to its involvement in the JET plan; and (4) the transportational feasibility of the exchange of students between the schools under consideration.

Exhibit 6 is a series of maps indicating the elementary School Groupings which evolved from an application of the above criteria. An examination of Exhibit 6 (A) reveals that Shawnee Elementary School in the northwest section of the Jefferson County School District, a predominantly black elementary school prior to its inclusion in the JET aspect of this desegregation plan, is grouped with Franklin Elementary School, Dunn Elementary School, Norton Elementary School and Wilder Elementary School. Exhibit 9 (A), which is designed to be utilized with Exhibit 6 (A), reveals the grade levels at each of the elementary schools in question which will be involved in JET, the number of children who will be involved at each school in a particular school year, the racial composition of each school prior to its involvement in JET, and the racial composition of each of the schools following application of the JET plan.

It will be noted, for example, that at least a portion of the pupils in grades 2 through 5 inclusive at Shawnee Elementary School will be involved in JET each year. Further, 174 children in the Shawnee Elementary School Subdistrict Attendance Area will be transferred to either Dunn, Norton, Wilder or Franklin Elementary Schools under the

JET plan. The racial composition of Shawnee Elementary School prior to the application of JET is 95.01% black. This racial composition is changed to 49.9% black by the application of the JET plan. The utilization of Exhibits 6 through 11 will reveal similar data for all the schools involved in JET.

At the elementary school level under the JET plan, pupils would proceed to their Home School each morning throughout the Jefferson County School District. After spending an initial period of at least one hour at the Home School learning Basis Subjects, pupils involved in JET, accompanied by their teachers, would then board a JET bus which would transport them to their Away School. Each bus utilized in the JET plan will be equipped with a speaker system which will make possible continuation of instruction during the time the pupils are on the JET bus traveling to their Away School. Upon the arrival of these pupils at their Away School, JET pupils are assimilated into the education milieu at the Away School. The pupils involved in JET would then spend 3½ to 4 hours at their Away School during which they would continue their training in Basic Subjects as well as undertaking additional training in music, art, social studies, science and physical education. The JET pupils would also eat lunch at their Away School. At the end of this approximate four hour block of time, the JET pupils would then return on a JET bus to their Home School. At the end of the School Day, these pupils would return to their homes in the normal fashion.

It should be emphasized that at the elementary school level entire classes of pupils would be involved in the JET exchange. Voluntary participation of minority students in any class involved in the JET program would be permitted. By utilizing this level of administrative organization as the basis for JET in the elementary schools, pairing of an

entire class from, for example, Shawnee Elementary School and Dunn Elementary School, is made possible for a complete school year. This organization structure will also allow Team Teaching in large group learning activities which insures the presence of a teacher who is fully familiar with the particular educational needs of one-half of the children in the paired class. In schools without facilities for combining two classes in a large group setting, racially mixed classes of regular size would be established for each teacher involved in class pairing. After a short time, each teacher would be familiar with individual needs and abilities of each child in the group.

JET further contemplates that the exchange of pupils between a predominantly white and a predominantly black school equalizes for each pupil the amount of time spent each year at an Away School. By taking advantage of the Elective Quarter Plan, pupils involved in JET would spend six weeks at a time *only* at their Away School. An example of this aspect of the plan is presented here for the benefit of the Court.

From an examination of Exhibit 6A it is determined that a portion of the total second grade at Shawnee Elementary School is to be involved in JET. An administrative determination is made that Mrs. Smith's second grade class would be paired with Mrs. Green's second grade class at Norton Elementary School. For the first six weeks of the fall Quarter, Mrs. Smith's second grade class would remain at Shawnee Elementary School (its Home School) throughout the entire school day. During this time, Mrs. Green's second grade class would travel to Shawnee Elementary School (its Away School) each day after the appropriate period of time at the Home School as indicated above. Mrs. Green and Mrs. Smith would work closely together to insure that proper scheduling of the entire School Day for each class was carried out.

At the end of the first six weeks, Mrs. Green's second grade class would then spend the entire day at their Home School and Mrs. Smith's second grade class would be transported to Norton Elementary School for the designated portion of the day. The two paired classes would then alternate throughout the remaining two Quarters the time spent at the Home and Away schools. Thus, Mr. Smith's second grade would spend one-half the school year in question at its Away School, Norton Elementary School, and one-half the year at its Home School, Shawnee Elementary School. Correspondingly, Mrs. Green's second grade class would spend one-half of the year in question at its Home School, Norton Elementary School, and one-half of the year at its Away School, Shawnee Elementary School.

Since racial compositions at schools are not uniform, the frequency with which pupils are involved in JET will vary. Clearly, a pupil who lives in a Subdistrict Attendance Area of an elementary, middle or high school exempt from JET will not be involved in JET over his total school career with the same frequency as a pupil of the same race in Subdistrict Attendance Areas where each elementary, middle and high school is involved in JET. Also, the number of children who must be involved in JET in a particular school will vary with the pupil racial composition of each Subdistrict Attendance Area, even in schools which are included in JET, as will the frequency of a pupil's involvement in JET. For example, Frayser Elementary School's racial composition is 5.64% black and 21 children would be involved in JET each Quarter at Frayser. Semple Elementary School, however, has a pupil racial composition of .2% black and 49 pupils would be involved in JET at Semple each Quarter. Thus, the percent of pupils involved in JET at Semple would be higher than the percent of Frayser pupils participating in JET.

At the middle school level, School Groupings were also developed for all middle schools not exempted under the JET criteria. Exhibits 7 and 10 illustrate the four School Groupings which evolved for the middle schools in the Jefferson County School District. Again, a predominantly black school was placed in a School Grouping with one or more predominantly white schools using the same criteria established for the formulation of School Groupings of elementary schools. An examination of Exhibit 10-A reveals that Meyzeek Middle School is grouped with Carrithers Middle school, Jeffersontown Junior High School and Fern Creek Junior High School. Columns 3 through 5 of this Exhibit indicate the number of pupils who will be involved in JET in a given year at each school and the racial composition of each school before and after the transfers proposed under JET.

Because the conversion to a uniform grade structure throughout the Jefferson County School District is not possible immediately due to the necessity of remodeling the physical plants of many schools, the school groupings illustrated for the middle schools in Exhibits 7 and 10 will not stabilize until all contemplated reclassifications have occurred.

The School Day in middle schools involved in JET would proceed somewhat differently from the timeline outlined for elementary schools involved in JET. It is again proposed that middle school pupils throughout the Jefferson County School District proceed to their Home middle school regardless of that school's involvement in JET. Upon a middle school pupil's arrival at a middle school, a pupil involved in JET at that school would have his first period of instruction for the day in the Home School. He would then board a JET bus and be transported to his Away School. For example, all middle school pupils residing in the Meyzeek Middle School Subdistrict Attendance

Area would arrive at school each day at the normal time. A pupil involved in JET would attend his first period class at Meyzeek, and then board a JET bus with a monitor to be transferred to either Carrithers Middle School, Jeffersontown Junior High School or Fern Creek Junior High School. During the time required for transportation to the Away School, the pupils' appropriate learning activities would occur. Upon arrival at the Away School, the pupil would then have four periods of instruction and lunch. At the end of the fifth period, the JET pupil would again board a JET bus with a monitor for transfer to his Home School. The time spent during the trip would be devoted to appropriate learning activities and the pupil would complete the remainder of the School Day at Meyzeek. At the end of the School Day, all pupils would then return home in the normal manner.

It must be noted that the JET plan at the middle school level deals with individual pupils rather than classrooms of pupils. This is required by the curriculum structure of the middle schools and recognizes the advanced maturity of pupils at this age level. Further, the frequency of involvement in JET at the middle school level will again vary somewhat between pupils both of a different race and of pupils of the same race. The same factors are involved in this discrepancy as were involved at the elementary school level.

As the JET plan for the middle schools does not involve the reassignment of entire classes, Paraprofessionals or study hall monitors will usually accompany the pupils on their JET buses. Some teachers may also accompany the pupils on the JET buses, but this will vary from school to school.

The JET plan for high school is also geared to the unique flexibility of the Elective Quarter Plan. Appropriate class scheduling for all high school pupils, whether

involved in JET or not, will be accomplished by Computer Scheduling. Three School Groupings were developed for the non-exempted high schools in the Jefferson County School District. These School Groupings were developed utilizing the same criteria as those used for formulation of the elementary and middle School Groupings. Exhibits 8 and 11 illustrate the School Groupings for high schools. An examination of Exhibit 11 reveals that Manual High School, a predominantly black high school prior to its inclusion in the JET plan, is grouped with Doss, Iroquois, Moore, Southern, Durrett, Fairdale and Atherton High Schools.

The number of pupils involved at a particular high school involved in JET during the first year of implementation is based on the adoption by this Court of an exemption for seniors during that year. After the first year of implementation, the number of pupils involved in JET at each high school will increase by about one-third to reflect the inclusion of seniors. The racial composition at each high school involved in JET will not, however, vary substantially from the racial composition indicated for the school in Exhibit 11 after its involvement in JET.

A high school pupil's involvement in JET will be based primarily on the Elective Quarter Plan. A black pupil who resides in the Subdistrict Attendance Area of a predominantly black high school involved in JET will be requested to voluntarily select six or fewer Quarters of the twelve Quarters required for graduation to spend at his Away School. A white pupil residing in the Subdistrict Attendance Area of a predominantly white school involved in JET will be asked to select three or fewer Quarters of the twelve Quarters required for graduation to spend at his Away School. If a sufficient number of pupils do not volunteer to fill the JET requirements of a particular Home high school, a method of random selection will be utilized

to determine which pupils will be required to spend a given Quarter of twelve weeks at the Away School. Credit will be given for each Quarter a pupil spends at an Away School so that participation in the JET program is equitably distributed according to the requirements for that school.

The School Day of a pupil involved in JET at the high school level will progress in the same manner as that of a pupil involved in JET at the middle school level. The high school pupil would arrive at his Home high school in the normal manner. The pupil would then have the first period class at the Home high school. At the conclusion of this period, all pupils involved in the JET plan would board a JET bus for transfer to their Away School. A monitor would accompany the group on each JET. The homeroom period would take place during the time required for this transfer. Upon arrival at the Away School the pupil would then have four periods of instruction and lunch prior to again boarding a JET bus for transfer back to the Home School. The time spent on the JET bus during the latter trip would be devoted to study hall and this period would be completed at the Home School upon the pupil's arrival there. At the end of the School Day the pupils would return home as usual.

C. Majority-to-Minority Transfer

At the high school level a pupil can volunteer for participation in the JET program for more than the required number of Quarters if the pupil so desires. Such voluntary majority-to-minority transfer is contemplated by 20 U.S.C. S1713 (c). Because of the strain on the transportational facilities of the Jefferson County School District occasioned by the implementation of the JET plan or any other desegregation plan involving the busing of large numbers of pupils, the Jefferson County Board envisions the possibility of having to restrict majority-to-minority transfers to schools within a given school grouping. Majority-to-

minority transfers would be possible at all three levels of the Grade Structure if there is sufficient space at the receiving school, but it might prove to be impossible to provide transportation to such pupils.

D. Reclassifications

Exhibit 15 indicates the name and geographic location of several schools in the Jefferson County School District which are proposed for Reclassification in order to facilitate making any desegregation plan adopted by this Court both more efficient and administratively feasible. It is proposed that DuValle Middle School be Reclassified as a high school. This would make possible changes in numerous Subdistrict Attendance Areas which would result in changes in the racial composition of the Subdistrict Attendance Areas thereby hopefully reducing the number of pupils involved in JET in each of the affected schools. However, even if dramatic results were not achieved in this regard, the proposed Reclassification would make the administration of any desegregation plan ordered by this Court more feasible. 20 U.S.C. S1713 (g).

It is also proposed that Foster Elementary School, Coral Ridge Elementary School, Chenoweth Elementary School and St. Matthews Elementary School be Reclassified as middle schools. The Board of Education of Jefferson County, Kentucky, is presently studying additional elementary schools for proposed Reclassification to middle schools and will advise the Court as soon as such determination has been made. These Reclassifications are primarily required by declining enrollment and the adoption of a uniform Grade Structure throughout the Jefferson County School District. These Reclassifications may, however, in some instances, have direct desegregative effects when affected Subdistrict Attendance Areas are redrawn pursuant to the guidelines of the Equal Educational Opportunity Act of

1974. The primary desegregative aspect of these Reclassifications as envisioned by the Board of Education of Jefferson County, Kentucky, would be, however, the facilitation of the orderly administration of any desegregation plan adopted by this Court and the reduction in many instances of travel distance required by any desegregation plan. The Board of Education of Jefferson County, Kentucky, must advise the Court, however, that all the aforementioned Reclassifications cannot be done immediately as changes must be made in the physical plant of the schools involved. As soon as a desegregation plan is ordered by this Court, however, the Board of Education of Jefferson County, Kentucky, will take immediate steps to effect Reclassifications upon their approval by the Court.

E. Anticipated Involvement and Adjustment

The JET plan, during the first year of its implementation, contemplates the involvement of 5,093 pupils at the elementary school level, 3,733 pupils at the middle school level, and 3,773 pupils at the high school level for a total of 12,599 pupils. It is anticipated that this figure would increase to approximately 14,000 pupils during the second year of implementation upon the inclusion of high school seniors in the plan. The figure would require an additional upward adjustment upon the involvement of first graders in the plan.

As shifts occur in the racial composition of the various Subdistrict Attendance Areas contemplated by the plan, the Court might wish to direct the revision of the number of pupils at each school involved in the JET plan, or perhaps even a realignment of School Groupings. It is anticipated that additional schools would qualify for exemption from the JET plan at such point in time as the racial composition of the school reached a minimum of 10% black or a maximum of 90% white. Adjustments in surrounding

schools necessitated by the exemption of a school in this manner would be then made along the same guidelines utilized in the initial formulation of the JET plan.

IMPLEMENTATION

Any desegregation plan necessarily deals primarily with logistics and methods of obtaining the goal of equal educational opportunities. Since the methods to obtain the elimination of all vestiges of a dual system require the use of all the tools prescribed by the Congress and the Courts including clustering, pairing, pupil assignment, faculty assignment, curriculum adjustment, etc., this plan has dealt primarily with these factors as well as the necessary transportation of pupils.

Once this proposed desegregation plan or some alternative has been ordered by the Court, the complex requirement of implementing the Court's plan must be begun and meticulously carried out.

An implementation team given the full authority of the school board, properly financed and vigorously supported by elected officials and staff and personnel of both school systems, is plainly required. It must be borne in mind that at the very time the desegregation plan is being implemented, the school system is engaged in the most difficult problem of merging two formerly separate school systems and that the implementation of the desegregation plan must be coordinated carefully with the implementation of the merger itself.

On July 19, 1974, in a Bench Opinion rendered by this Court in earlier proceedings, the Court expressed and delineated certain requirements for implementation which are now incorporated herein as follows: (1) the implementation team will devise a procedure for the hearing and review of unforeseen family hardship cases to be conducted by a bi-racial group within the school administration. This group's decisions relative to such matters shall, on request,

be reviewed de novo by this Court and the United States Magistrate. It is proposed that this Court's final judgment incorporating a desegregation plan incorporate those provisions of the Court's findings of July 19, 1974, relative to the United States Magistrate as Special Master pursuant to the provisions of Title 28 U.S.C. 636 (b) with the authority and power provided therein.

CONCLUSION

The Jefferson County Board of Education is prepared at evidentiary hearings which the Court has indicated it will conduct to furnish full detailed information, including specific assignment of children within the Subdistrict Attendance Areas. Information and data relative to the assignment of particular children to particular schools will be compiled by the staff pending final determination of this Court as to the pupil assignment method.

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Counsel for the Board of Education of Jefferson County

It is hereby certified that a copy of the foregoing Proposed Desegregation Plan Submitted Pursuant to Order of January 29, 1975, was served on all counsel of record on this the ____ day of April, 1975.

_____

John A. Fulton

EXHIBITS

1. Excerpts from 20 USC 1701 et seq.
2. The Jefferson County School System as Presently Constituted
3. Elementary Schools After Redistricting
4. Middle and Junior High Schools After Redistricting
5. High Schools After Redistricting
6. (a-f) Elementary School Groupings Under JET
7. (a-b) Middle School Groupings under JET
8. (a-b) High School Groupings Under JET
9. (a-f) Elementary School Grouping Charts
10. (a-b) Middle School Grouping Charts
11. (a-b) High School Grouping Charts
12. JET Exempt Elementary Schools
13. JET Exempt Middle Schools
14. JET Exempt High Schools
15. (a-b) Proposed Reclassifications
16. Proposed Elementary School Closings

ELEMENTARY SCHOOLS—BY PERCENTAGES

10.0
Blake
Camp Taylor
Coral Ridge
Crums Lane
Greenwood
Gutermuth
Johnsontown
Kerrick
Laukhuf
Layne
Rutherford
Sanders
South Park
Waller
Wheeler
Wilkerson

10.1
Auburndale
Bates
Blue Lick
Fern Creek
Gilmore Lane
Trunnell
Waston Lane
Wilt

10.2
Belknap
Dixie
Fairdale
Goldsmith
Hite
Jeffersontown
Klondike
Prestonia
St. Matthews
Semple
Stivers
Smyrna

10.3
Bloom
Filson
Luhr

10.7
Valley

10.8
Lowe

11.0
Medora
Minors Lane

11.1
Eisenhower

11.3
Stonestreet

11.4
Chenoweth

11.5
A. Kennedy
Wilder

11.6
Watterson

12.2
Frayser
Shacklette

12.3
Franklin

12.4
Dunn
Hartstern

12.5
Johnston
Middletown

12.6
Greathouse

12.8
Shryock

13.1
Cochrane

13.3
Wellington

13.5
Okolona

13.6
Jacob

13.7
Kenwood
Zachary Taylor

13.8
Atkinson
Field
Hazelwood

14.0
Bowen

14.6
Norton

14.8
Schaffner

14.9
Cochran

15.5
Lowell

20.0
Mill Creek
Slaughter

21.3
Roosevelt

22.2
Indian Trail

24.1
Englehard

29.1
Breckenridge

30.8
Shelby

36.1
Bashford Manor

38.8
Portland

40.4
Rangeland

47.5
Price

48.7
Cane Run

49.8
Jones

49.9
Brandeis
Shawnee
Young

50.0
Byck
Coleridge-Taylor
Foster
King
Lincoln
McFerran
Parkland
Southwick
Strother
Wheatley

50.1
Carter

50.3
Perry

JR. HIGH-MIDDLE SCHOOLS—BY PERCENTAGES

10.6
Jeffersontown Jr.

10.7
Carrithers Middle

10.8
Williams Middle
Fern Creek Jr.

11.1
Southern Middle

11.3
Kammerer Middle

11.4
Knight Middle

11.5
Moore Jr.

11.6
Fairdale Jr.

11.7
Crosby Middle

12.0
Highland Middle

12.1
Waggener Jr.
Southern Jr.

12.5
Doss Jr.

12.7
Western Jr.
Myers Middle

12.8
Lassiter Middle

13.5
Conway Middle

14.0
Pleasure Ridge Jr.

14.3
Stuart Jr.

14.6
Westport Jr.
Iroquois Middle

14.7
Valley Jr.
Barret Middle

15.1
Durrett Jr.

15.5
Frost Middle

18.6
Ballard Jr.

22.3
Bruce Middle

23.6
Eastern Jr.

27.7
Butler Jr.

32.8
Western Middle

36.6
Woerner Middle

37.4
Newburg Middle

41.7
Noe Middle

49.9
Shawnee Middle

50.0
Meyzeek Middle
Parkland Middle
DuValle Middle

HIGH SCHOOLS—BY PERCENTAGES

10.0
Moore
Stuart
Pleasure Ridge Park
Jeffersontown
Ballard
Westport

10.1
Seneca
Fern Creek
Waggener
Eastern
Iroquois

10.4
Western

10.5
Doss

10.8
Fairdale

11.0
Valley

11.1
Atherton

11.4
Southern

11.5
Durrett

26.2
Ahrens

30.4
Thomas Jefferson

41.4
Butler

43.5
Male

50.0
Manual
Shawnee
Central

JEFFERSON COUNTY SCHOOL SYSTEM
SUMMARY

School Classification	Total White	Total Black	Total Membership	% Black
Elementary	48,168	15,259	63,427	24.06
Middle and Junior High	12,432	6,480	18,912	34.26
Secondary	45,252	7,220	52,472	13.76
Special Schools-Elementary	315	15	330	4.55
Special Schools-Secondary	148	68	216	31.48
TOTAL SCHOOLS	106,315	29,042	135,357	21.46

EXHIBIT #3

JEFFERSON COUNTY SCHOOL SYSTEM
ELEMENTARY SUMMARY
TOTAL
TO
JET
GRADES 2-5
5,093

EXHIBIT #4

JEFFERSON COUNTY SCHOOL SYSTEM
MIDDLE SCHOOL SUMMARY
TOTAL TO JET, GRADES 6, 7, & 8
3,733

EXHIBIT #5

JEFFERSON COUNTY SCHOOL SYSTEM
HIGH SCHOOL SUMMARY
TOTAL TO JET, GRADES 9-11
3,773

SUPPLEMENT TO PROPOSED DESEGREGATION PLAN (JET) FILED JULY 30, 1975 (SOME EXHIBITS OMITTED)

May it please the Court:

This supplement to the Proposed Plan of Desegregation filed by the Board of Education of Jefferson County, Kentucky, as constituted prior to April 1, 1975, is submitted pursuant to this Court's Order of January 29, 1975, as modified March 31, 1975. The Preamble of the plan submitted on April 30, 1975 (hereinafter referred to as the "JET

Plan") is fully reiterated as if copied verbatim herein. In no wise is the document filed here today to be considered a voluntary action of the Jefferson County Board of Education as constituted prior to April 1, 1975, or the educational policy of such board.

This supplement to the JET Plan consists of nine exhibits which illustrate the specific pupil assignment methodology of the Plan as applied throughout the system, the proposed solution to the Newburg Area problem, a proposed solution to the Cane Run Area problem, the changes required in the transportation and curriculum schedules in order to implement the plan without the purchase of additional buses, a list of JET exempt schools, specific information concerning the schools in each JET Cluster and a cost summary for implementation of the JET Plan. While the exhibits are largely self-explanatory, for the convenience of the Court, they will be described briefly herein.

Exhibit 1A explains in detail the development of the JET Plan specific pupil assignment methodology. The methodology is based on the concept that whenever possible the burden of pupil reassignment should be equalized as among blacks and whites. By building on the strong points of the quarter system and utilizing a six-week alternating exchange program between paired black and white classes, it will be noted that the burden of reassignment on black children is significantly reduced, while at the same time, insuring that the involvement of all white pupils in the Jefferson County school system in a plan of meaningful desegregation.

Exhibit 1B sets out the JET Plan specific pupil assignment on a Cluster-by-Cluster basis. Utilizing this exhibit, parents in the community can, on determining their proper home school, tell what year or years their children will be required to be reassigned to an away school. Also contained in Exhibit 1B is a matrix which was followed to

determine which quarters particular classes would be involved in the exchange program.

Exhibit 2, maps of the proposed sub-districts for all schools in the Jefferson County school system under the JET Plan, will not be filed with the Court at this time, but is available at the Richard VanHoose Educational Center for inspection by any of the parties and will be produced for the Court upon its order.

Exhibit 3 and Exhibit 4 outline in detail specific proposals under the JET Plan for the Newburg and Cane Run areas of the former Jefferson County school district as constituted prior to April 1, 1975. These proposals are outlined in detail due to their unique nature.

Exhibit 5 explains the typical school day under the JET Plan. It should be noted that this exhibit proposes a time schedule which is substantially different from that offered in the main body of the JET Plan filed on April 30, 1975. Children who will be transported to an away school will no longer receive any instruction at their home school but will simply board a JET bus at their home school with their teacher or a monitor and then proceed to the away school for the remainder of the school day.

Exhibit 6 explains the transportation schedule required to implement the JET Plan. It should be noted that elementary school runs will be made after the peak rush hour time and therefore the time pupils will be on these runs will be significantly shortened. It should also be noted that the transportation schedule outlined in Exhibit 6 allows the implementation of the JET Plan without the purchase of any additional buses by the school system.

Exhibit 7 lists all schools which are proposed to be exempted from the JET remedy. Elementary schools are listed together alphabetically in Exhibit 7A with the racial composition of the school and its pupil membership. Exhibits 7B and 7C give similar information for middle and junior high schools and high schools respectively.

Exhibit 8 gives transportation and cost information on a Cluster-by-Cluster basis. Exhibit 9 is a cost summary of the JET Plan.

Respectfully submitted,

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Board of Education

It is certified that a copy of the foregoing Supplement to Proposed Desegregation Plan filed April 30, 1975, was delivered to all counsel of record on July 30, 1975, in Chambers of Hon. James F. Gordon, Chief Judge, United States District Court for the Western District of Kentucky.

(s) John A. Fulton

CLASS PAIRING CONCEPT
JET Addendum Exhibit 1-a

The class pairing concept as a tool for desegregation was developed as a part of the total desegregation plan implemented in the Denver Public Schools at the beginning of the 1974-75 school year. Thirty-seven Denver elementary schools exchange classes to provide a desegregated setting for grades 4-5-6 in the morning and grades 1-2-3 in the afternoon. This exchange is described as a "part-time pairing program."

Jefferson County Public Schools operate on a quarter plan schedule for all grades. This division of the school year lends itself to class pairing and individual pupil exchange in an orderly and equitable manner. Both elementary and secondary students can be exchanged without placing an unfair burden on any class or individual pupil. In addition, a transportation schedule can be arranged to establish a desegregated instructional day covering a minimum of 5½ hours of the state-required six-hour day, with each class or individual pupil beginning and ending the day at the home school.

The fundamental concept of elementary class pairing can best be illustrated with an example of two classes at a predominantly black school and two classes at a predominantly white school. All four classes are of the same grade level.

During the first six weeks of the 12-week quarter one black class and one white class remain at their respective home schools. The other black class and the other white class travel to their respective away schools. The teacher of each traveling class accompanies that class. Space left behind by the traveling class at each school is utilized when the visiting class arrives to provide a team-teaching situation for the entire group made up of one white and one black class, or two-self-contained classrooms with the children distributed equally between the two teachers. Classes reverse directions the second six weeks of the quarter. Traveling classes the first six weeks become the home class the second six weeks, while "home" classes and their teachers become the traveling classes. No change takes place in the association of the two paired classes. The setting simply changes to the other school.

SIXTH GRADE ADJUSTMENT

All schools in Jefferson County cannot be converted immediately to the 5-3-4 elementary, middle and high school pattern. Until enough middle schools can be established, some elementary schools will house grades 1-6.

In order to exchange students at the sixth grade level it will be necessary to maintain a certain number of sixth grade classes at DuValle, Parkland and Shawnee Middle Schools on an elementary schedule and curriculum so these pupils can be paired with predominantly white 6th grade elementary classes. This adjustment will require movement of 700 students daily. DuValle Middle School will have ten elementary 6th grade classes; Parkland eight and Shawnee, ten.

MIDDLE SCHOOL AND HIGH SCHOOL PUPIL EXCHANGE

Pupils will not be paired by classes at the middle and high school level. Instead, each participating school will be assigned the number of places needed to achieve a desegregated school. Each pupil will know how many quarters the pupils at that school will be required to participate, and have an opportunity to volunteer for a place in any unfilled quarter. If all places are not filled by volunteers, birthdate selection according to the national draft lottery will be used to designate those who participate. Students will be draft-proof when they fulfill their exchange obligation by volunteering the needed quarter or quarters.

Places will be allocated by grade classification to make exchange administratively feasible. Pupils spend the entire quarter at their "away" school, and may choose to participate more than the required number of quarters if they wish. White students will have no choice of middle or high school exchange assignment. Black students may choose a

school in their home school cluster as long as there is space available.

Any student wishing to utilize the majority-to-minority transfer may participate all quarters at the middle or high school and remain for extra-curricular activities. Transportion for such students will be provided as required.

JET ADDENDUM EXHIBIT 1-a

JEFFERSON COUNTY SCHOOL SYSTEM
ELEMENTARY SCHOOLS
JET EXEMPT

Schools	Membership Grades 2-5	Membership Grades 2-6	% Black
Atkinson	545		13.8
Bashford Manor		418	36.1
Breckenridge	443		29.1
Cane Run		462	48.7
Crums Lane	350		10.0
Englehard	311		24.1
Hazelwood	653		13.8
Indian Trail	387		22.2
Johnston	320		12.5
Luhr		604	10.3
Mill Creek		325	20.0
Portland	384		38.8
Price	514		47.5
Rangeland	396		40.4
Roosevelt	314		21.3
Shelby	344		30.8
Slaughter	370		20.0
Watterson		405	11.6

JET ADDENDUM EXHIBIT 7-b

JEFFERSON COUNTY SCHOOL SYSTEM
MIDDLE SCHOOLS
JET EXEMPT

Schools	Membership Grades 7-8	Membership Grades 6, 7, 8	% Black
Barret Middle	436	651	14.7
Bruce Middle		881	22.3
Butler, Jr.			27.7
Myers Middle		815	12.7
Newburg Middle		961	37.3
Noe Middle		995	41.7
Western Middle		1,221	32.8
Woerner Middle		811	36.6

JET ADDENDUM EXHIBIT 7-c

JEFFERSON COUNTY SCHOOL SYSTEM
HIGH SCHOOLS
JET EXEMPT

Schools	Capacity	Membership Grades 9-11	% Black
Ahrens	1,470	1,051	26.2
Butler	2,450	1,220	41.4
Jefferson, Thomas	2,200	1,268	30.4
Male	1,488	1,202	43.5

ADOPTED DESEGREGATION PLAN, FINDINGS OF FACT AND CONCLUSIONS OF LAW, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY, JULY 30, 1975 (SOME EXHIBITS OMITTED)

JUDGMENT—Entered July 30, 1975

Pursuant to findings of fact and conclusions of law made this day and attached hereto as a part of this judgment and decree of court,

IT IS CONSIDERED, ORDERED AND ADJUDGED:

1. The various desegregation plans presented to the Court by the respective parties for the desegregation

of the school districts in Jefferson County, Kentucky, as heretofore ordered are rejected.

2. The plan contained in the Findings of Fact and Conclusions of Law prepared by the Court with the advice, aid and assistance of the staff of the Jefferson County Public Schools and the demographic expert of the plaintiffs and others is hereby ordered implemented.

3. Included in the plan hereby ordered are the following integral parts: student assignments; schools to be closed; procedures relating to hardship; method of transportation; assignment of school employees, including teachers, administrators and other certificated personnel; human relations programs; transportation schedules; procedures for enforcement and implementation; and monitoring and reporting procedures for this plan. Further, this plan details what actions and activities are considered by the Court to be vital to the successful implementation of the plan and what acts in violation thereof will be treated by the Court as obstacles by the Court to the appropriate implementation of the plan for which appropriate action by the Court will be taken.

4. The taxable court costs of these proceedings throughout are hereby taxed against the Jefferson County Board of Education and the attorneys for the plaintiffs may make appropriate separate application for attorneys' fees in accordance with existing law which will be considered by the Court and allowed by subsequent order.

This 30 day of July, 1975.

(s) James F. Gordon
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These Findings of Fact and Conclusions of Law are made this day as a part of the Judgment entered this day. The Court has from time to time, in its various opinions and orders, rehearsed the facts and the chronology of this litigation, all of which may be referred to in the various orders of this Court from the beginning of the case to date, and it is not necessary that they be repeated here.

The Court previously ordered the former Jefferson County Board and the former Louisville Board to file proposals for a desegregation plan and gave the plaintiffs and all other parties appropriate opportunity to file such observations and criticisms as they desire. The Court has concluded that no plan of desegregation submitted to it entirely meets the requirements which the Court believes that the Congress and the Courts have imposed upon this Court in carrying out the mandate of the Sixth Circuit Court of Appeals and all vestiges of state-imposed segregation be eliminated from the dual school systems which the Supreme Court of the United States found to exist and which the Sixth Circuit Court of Appeals, as late as the seventeenth day of July ordered this Court to eradicate by the implementation immediately of a desegregation plan.

In developing the following desegration plan, the Court has utilized to the fullest the staff of the Jefferson County School System, as well as an expert provided by the plaintiffs, and others, and wishes to express publicly the Court's sincere regard to these individuals for their expertise and competence. The Court feels that this community should be aware of the fact that it was not necessary, as many Courts have been required to do, to go outside the competent available professional school personnel already at work in this community to enlist the aid of "outside experts" who, despite their competence, may not after all have the

intimate knowledge of the school system that the professional staff of these school systems already has.

The Court recognizes and commends the public officials who compose the school board who were formerly members of the Jefferson County and Louisville Boards of Education. The Court recognizes full well that individual members of the merged Board do not concur or agree with the philosophy or the methods that are involved in the Court's desegregation plan, or even the necessity for such a plan at all. But those members of the Board, despite their different views, have recognized that as responsible and mature public officials, they have an obligation under the rule of law to carry out the orders and directions lawfully imposed upon them by the courts of this land and the Congress. This Court is grateful to those Board members who have undertaken to abide by and obey the law. The Court is confident that they will do so throughout the remainder of their public service.

In a judgment rendered in this action on July 25, 1974, certain guidelines were recognized by the Court as being basically sound. Since that time, additional action by the Congress of the United States in the Equal Educational Opportunity Act of 1974 reflected the policy of Congress in the legislation which this Court has scrupulously attempted to follow to the extent that the Court believes that the Act complies with the Constitution as interpreted by the current decisions of the federal courts, including the Supreme Court of the United States. Accordingly, the Court, in formulating a remedy to correct the denial of equal educational opportunity or a denial of the equal protection of the laws which the Supreme Court found to exist in this case, has considered and hereby makes specific findings that Section 214 dealing with the priority of remedies has been considered and followed by this Court to the best of its ability and the priorities therein delineated have been meticulously

followed as well as the other provisions of the amendments adopted by the Congress in 1974.

The Court has considered four factors essential to any plan which would carry out the mandate of the Sixth Circuit Court of Appeals and the Supreme Court of the United States in this case. They are:

1. *Stability*—A plan to be appropriate and worthwhile must be stable over an extended number of years. A plan which requires constant revision from year to year would damage public confidence as well as the quality of education. In an attempt to insure stability over an extended period, a student selection methodology involving the use of minimum and maximum ratios at particuar schools has been devised.
2. *Equity*—A plan to be successful must treat students within racial categories with equity. No person or student should be required to bear an unreasonable or disproportionate burden in the desegregation of the schools. Because the black students in the school system as a whole constitute only 20% of the total student body, it is inevitable that they will be required to be transported more often than white students.
3. *Predictability*—In addition to stability and equity, the ability of all persons in the community to know, and predict the impact of the plan on individual students during their twelve-year school experience is imperative. The student selection methodology utilized in this plan permits students, as well as parents, teachers, and other in the community, to determine within reason what years students may expect to be transported in the desegregation plan during all the years they are in school.

4. *Simplicity*—Within the limits permitted by stability, equity and predictability, the plan has been the subject of the most careful investigation in order that those responsible for the transportation system, the community at large, and especially the parents and the students may quickly understand how the plan functions and what it will require of each individual.

The following specific guidelines are enumerated to accomplish the general requirements set forth above. In order to accomplish the racial ratio in individual schools by a methodology of student selection that would promote stability, equity, predictability and simplicity, the plan incorporates the following:

1. All elementary schools in the Jefferson County School System will have a black population of no less than 12% and no more than 40%.
2. All secondary schools within the Jefferson County system will have a black student population of no less than 12½% and no more than 35%. Only the Newburg Middle School deviates from this guideline and it is specifically found to be acceptable to the Court for the reasons discussed hereinafter.
3. The method of selecting students to be transported for the purpose of this desegregation plan insures that every student, within racial categories, participates as equally as possible. The only exception to this rule occurs when a student attends a school that this Court has determined is already at this time sufficiently desegregated within the guidelines set out above so that transportation is not required. As set out hereinafter, if any individual school ratio or population changes in a material fashion, appropriate steps will be taken to include that individual

school and its students in the general transportation plan. The student selection method chosen reduces to the minimum the number of students required to be transported to implement this plan and the minimum cost factor commensurate therewith.

STUDENT ATTENDANCE AREAS, SCHOOL CLOSINGS, AND CLUSTERING

The Court utilized base student membership data and other information supplied by the Jefferson County School System regarding racial composition, program capacity, and other factors relating to all the schools within Jefferson County. The figures used are based on student membership and demographic data in the community developed early in 1975 by the staff of the school system. It is important that the community understand that the demographic data and student attendance figures reflect the best available information to the Court and that any demographic changes in the county since the time the figures were obtained may cause some inaccuracy which will require minor revision of this plan. The school administration will make the appropriate revision as a part of the implementation of this plan.

As previously stated, the Court has meticulously followed the priorities and remedies set forth in the Equal Educational Opportunity Act of 1974. New boundary lines, within practical limits, have drawn for school attendance areas to insure the maximum desegregation of the schools without the use of any other remedy, including transportation. In creating the new attendance areas, the Court observed that a number of schools in the Jefferson County School System, because of declining enrollment, are presently under-utilized. In short, there are not enough students in the school buildings to justify their continued use as a school building in light of all the circumstances. The

closing of these schools will affect a substantial dollar savings without impairing the capability of the school authorities to comfortably house the student body; therefore, as an integral part of this desegregation plan, necessary to its successful implementation, the schools listed below will be closed. The facilities may be used for other purposes at the discretion of the school board with approval of court. In no case has any predominantly black school been closed to reduce the burden of desegregation upon the white community. The list of schools closed is as follows:

Audubon Elementary
Beechmont Elementary
Carmichael Elementary
Clark Elementary
Dolfinger Elementary
Emerson Elementary
Heywood Elementary
Longfellow Elementary
Southwick Elementary
Tingley Elementary
Washington Elementary
Russell Junior High

Certain elementary schools, upon examination, were discovered to have a school attendance area which fixed the black-white ratio within the school from 12 to 40% black without the necessity of using any remedial tool other than specific assignment of the students to the school. In other words, the Court considered the schools to be desegregated. Likewise, certain secondary schools in the newly designed school attendance areas will have a black student percentage from 12½% to 35% and are considered desegregated for the purposes of this plan. The list of the schools and the percentage of black student population resulting from re-

districting and the creation of the student attendance areas are:

Atkinson Elementary	27% black
Bashford Manor Elementary	33% black
Breckinridge Elementary	32% black
Engelhard Elementary	29% black
Hazelwood Elementary	12% black
Indian Trail Elementary	22% black
Johnston Elementary	15% black
Mill Creek Elementary	20% black
Portland Elementary	34% black
Roosevelt Elementary	22% black
Shelby Elementary	28% black
Slaughter Elementary	20% black
Watterson Elementary	12% black
Bruce Middle School	12% black
Myer Middle School	13% black
Newburg Middle School	37% black
Butler Junior High	14% black
Noe Junior High	24% black
Southern Junior High (City)	16% black
Western Junior High (City)	27% black
Western Junior High (County)	13% black
Woerner Junior High	28% black
Ahrens High	24% black
Butler High	22% black
Iroquois High	23% black
Manual High	29% black
Thomas Jefferson High	27% black
Western High	26% black

The Newburg Middle School, created by the school board, exceeds the Court's guidelines for desegregated

schools by two percent; however, in considering all the factors carefully, the Court will not include Newburg Middle School in any transportation plan at this time. The Board of Education, in the opinion of the Court, has by recent action used appropriate remedies available to it to desegregate the Newburg area. The Court commends the Jefferson County Board of Education for this action and feels that any further action on the Court's part would be an unreasonable and counterproductive interference in the efforts of the school board to arrange its own affairs in accordance with law.

After creating new school attendance areas by the use of redistricting (Appendix 1A) and fixing minimum requirements for student racial ratios within limits which this Court considers to be constitutionally permissible, the Court reluctantly determined that these remedies by themselves or in combination with all the additional remedies provided by the Equal Educational Opportunities Act would not meet the constitutional requirements as interpreted by the courts to dismantle the existing dual school system and eliminate all vestiges of state-imposed segregation found by the Supreme Court of the United States to exist in this community.

The additional tool or remedy approved by the courts, including the Supreme Court, of clustering and pairing schools was adopted. The Court has therefore, as a part of the plan, clustered and paired black schools with white schools and requires the Jefferson County Board of Educaton to transport students between these schools in order to achieve the appropriate desegregation of the school system. The elementary school clusters and pairings, as well as the secondary school clusters and pairings, form a part of this desegregation plan and are designated Appendix 1B.

Appendix 1B demonstrates the degree of desegregation achieved at schools within certain clusters and schools which have been paired following the application of the student assignment methodology described hereinafter.

There is disparity in grade structure among elementary, middle, junior and senior high schools in the Jefferson County School System. During the first year of implementation of this plan a 6-2-4, 6-3-3, or 5-3-4 grade structure will be utilized. The school system will move as quickly as it is instructionally and financially feasible to a system-wide 5-3-4 grade structure. This transition will not affect the desegregation plan, since all grades are proposed to be desegregated.

The Court observes at this point that the Cane Run and Schaffner Elementary Schools share a common elementary attendance zone under this plan as will the Price and Hartstern Elementary Schools. The Rangeland and Luhr Elementary Schools will also constitute a common attendance area, although these two attendance areas are not contiguous. These schools will become graded centers housing three grade levels as indicated in Appendix 1B. The 7th and 8th grades at Seneca have been eliminated.

STUDENT ASSIGNMENT METHODOLOGY

The Student Assignment Methodology incorporated in this desegregation plan is as follows:

1. First grade students will remain at their district school in the student attendance area in which they live for the *entire* Fall Quarter in every school year. During some portion of the *Winter* and *Spring* Quarters in elementary schools which are required to have children transported for the purpose of this desegregation plan, first grade students will participate in a *class exchange* program. These pupils will

be transported as a class unit rather than as individuals and their teacher will accompany them. The first graders being transported during these quarters will be involved in a program with strong emphasis on human relations.

2. Students who qualify as seniors (12th grade) for the Fall Quarter of 1975 will not be required to be transported from the district school in their school attendance area for the purposes of desegregation during the first year of implementation of this plan of desegregation. Senior students, like all other students, will be required to attend the high school within the school attendance area where they reside.
3. The following categories of children will not be transported under the provisions of this plan relating to desegregation because of their unique educational requirements—they will be exempted from the transportation requirements of this plan:
   A. Orthopedically Handicapped
   B. Trainable Mentally Handicapped
   C. Deaf
   D. Hard of Hearing
   E. Learning Disabilities (self-contained unit only)
   F. Emotionally Disturbed
   G. Visually Handicapped
4. The following educational facilities or programs will not be included in that portion of the desegregation plan involving student transportation because of the unique nature of the facility or program:
   A. Kindergarten
   B. Head Start
   C. Teen-Age Parents Program

D. Alternative Schools
E. Brown School
F. Ormsby Village
G. Mill Creek Rehabilitation School
H. Melbourne Heights Trainable
I. Lynwood Girls Schools
J. Jewell Manor School
K. Jeffersontown Annex (Special Education Classes)
L. State Reception Center
M. Re-Ed School
N. Lyndon Rehabilitation School

5. Schools which the Court considers desegregated by reason of the racial ratio in the school attendance area have been previously described. Students who attend the schools heretofore designated as being desegregated for the purposes of this plan will not participate in the transportation requirements of this plan.

6. Only those students in the categories specifically listed hereinabove, will be exempted from the transportation provisions of this plan unless other students are specifically exempted under the hardship policy provisions of this plan set forth in the Student Personnel Section.

ADDITIONAL PROVISIONS FOR STUDENT ASSIGNMENT

1. All assignments for students in grades 2 through 12 will be a whole-day and whole-year (three quarters) basis. Students will participate in extra-curricular activities at the school where they are assigned and instructed.

2. All white students have been divided into six groups equal in number based upon the first letter or letters of the alphabet with which their last names begin. (For example, the number of students whose last names or surnames begin with A-B-F-Q may be equal in number to the students whose last names or surnames begin with I-J-K-S and four other groups of letters. On Table I below, W1, W2, W3, W4, W5, or W6 each is a group of letters roughly equal in terms of student population with any other group of letters). The actual letter groupings have *not* been established and these letter groupings are used for purposes of illustration only.

TABLE I
Student Assignment Chart

Letter Groups							Letter Groups					
W1	W2	W3	W4	W5	W6	Grade	B1	B2	B3	B4	B5	B6
Class Interchange (Winter, Spring)						1	Class Interchange (Winter, Spring)					
	v					2	v	v	v	v		
		v				3	v	v	v	v		
			v			4			v	v	v	v
				v		5			v	v	v	v
					v	6			v	v	v	v
	v					7	v	v	v		v	v
		v				8	v	v	v		v	v
			v			9	v	v	v		v	v
				v		10	v	v		v	v	v
v						11	v	v		v	v	v
v						12	v	v		v	v	v

3. Each group of white students represented by W1, W2, W3, etc. will be randomly assigned one or two grade levels to be transported for desegregation consistent with the Table I above. (For example, those white students whose names begin with A-B-F-Q might be the W3 group on Table I and be transported for desegregation for the third and eight grades. They would attend their district school at all other grade levels).

4. It should be noted that the W1 group is assigned to two consecutive years based on the educational and social value of continuity at the junior and senior years.

5. All black students have been divided into six groups of equal number based on the first letter or letters with which their last or surnames begin. (For example, the number of students whose last names begin with A-B-F-Q may be equal in number to students whose names begin with I-J-K-S and four other groups of letters. B1, B2, B3, B4, B5, and B6 each is a group of letters roughly equal in terms of student population with any other group of letters).

6. Each group of black students represented by a letter group such as B1 will be randomly assigned eight or nine grade levels to be transported under the desegregation plan consistent with Table I. For example; those black students whose last names or surnames begin with A-B-F-Q might be the B3 group on Table I and be transported to an assigned school from second grade through ninth grade. They would attend their district school from tenth grade through twelfth grade).

   (An assigned school is the school where the child receives instruction and is to be distinguished from the district school which is the school building in the school attendance area in which he lives.

7. Students from a black school which is in a cluster must be assigned among a number of white schools in the same cluster. This will require the students at a black school to be further sub-divided. This division will be accomplished by random assignment of black students to the several white schools with which they are clustered. Because there is only one black

school in a cluster, white students will not need to be further sub-divided for purposes of assignment.

8. This assignment methodology provides for equitable particiation in the desegregation plan. If a student is required to be transported at a given grade level, that requirement will apply to any public school the student attends in Jefferson County unless that school is exempted from the transportation of students for purposes of desegregation.

9. A student's grade level assignment at the beginning of the Fall Quarter of a given school year will determine the student's school assignment for the entire year.

10. The Court directs the Jefferson County School System to apply this method of student assignment and to assist students and parents by providing specific information when necessary.

11. Letter groups (B1, etc. and W1, etc.) will be assigned in a random fashion to the transportation patterns by the Court as soon as possible. The school admintration will be notified of the random selection by the Court.

Some of the results of the method of student assignment and selection are as follows:

1. Eighty-four percent (84% of the white students in grades 2 through 12 who are transported for the purposes of desegregation will be transported for two years, usually one year in the elementary grades and one year in the secondary grades. Sixteen percent (16%) of the white students assigned to be transported for desegregation will be transported for one year.

2. Sixty-six percent (66%) of the black students in grades 2 through 12 will be transported for the purpose of this desegregation eight years. Thirty-three percent (33%) of the black students will be transported for purposes of desegregation nine years. Black students will attend the district school in the school attendance area in which they reside for two or three successive years during their twelve-year school experience.

3. Black percentages in all elementary schools will be no less than 12% and no more than 40%. Black percentages in all secondary schools almost without exception will be no less than 14% and no more than 23%. One of the major accomplishments of this desegregation plan evolved by the Court with the assistance of the staff is to reduce to a marked degree the number of students which the Court had anticipated would be necessary to transport in its judgment of July 25, 1974, when from the bench, the Court was required to order Plan X. The Court is convinced that the maximum number of students which will be transported under this plan approximates 23,000 rather than the very substantially larger number in Plan X ordered by the Court in July of 1974. Furthermore, the Court as assured by the transportation officer of the school system that Plan X could not have been accomplished without obtaining buses which were not available.

4. By ensuring that a student will be assigned the same assignment pattern for purposes of desegregation no matter where the student resides in the County and by maintaining a limited range of acceptable racial ratios in individual schools, the Court has attempted to minimize the possibility of white flight.

STUDENT PERSONNEL

Hardship Cases, Sick Child, and Student Attendance

At the direction of the Court, the Superintendent of the Jefferson County schools and his staff have prepared policies and procedures dealing with hardship cases, student illness, student personnel and student attendance. The Court hereby approves those policies and incorporated them into and makes them part of this desegregation order and they will be implemented.

1. Student Hardship Policy and Procedures

   The administration of the Jefferson County School System shares the concern of parents relating to each individual student and the health, safety and welfare of all students. There will be legitimate reasons for students to be transferred to schools other than their assigned location. The student hardship policy is intended to be a practical and administratively feasible method of equitable application to individual children within the policies set forth in the desegregation order of the United States District Judge and adopted by the Jefferson County Board of Education.

   Due consideration will be extended to students with severe emotional, health or social problems. The following procedures must be followed if a parent or guardian desires consideration of a hardship transfer for a student to a school other than the school to which the student is regularly assigned.

   A. A parent may obtain a hardship application form at any school or administrative office of the Jefferson County School System.

   B. The completed application for a special hardship request may be returned to any school or administrative office or mailed to the Director of Special Trans-

fer, Richard VanHoose Education Center, 3332 Newburg Road, Louisville, Kentucky 40218.

C. Approval or denial of the special hardship request will be the responsibility of the Director of Special Transfers and a Hardship Request Committee. Supportive evidence and recommendations from qualified persons having knowledge of the student's need for transfer will be given careful consideration.

D. The Director of Special Transfers will be responsible for providing the Court with accurate documentation by school, grade, race of all hardship requests approved or disapproved.

E. When a transfer request is granted and the student is unable to utilize the regular school transportation service to reach the assigned school the parent or guardian will be responsible for the student's transportation and regular attendance.

2. Hardship Requests for Curriculum Needs

A request based upon curriculum needs is subject to the following procedures:

A. Only senior high school students (9-12) will be considered for transfer on the basis of academic hardship.

B. A request for a transfer for academic hardship will be considered and if granted the school system will assign the student to the school which offers the needed program.

C. A student making a transfer request on the basis of academic hardship must register at his assigned school. Consideration for a transfer can be given only after all students are registered and class schedules are completed.

3. Hardship Requests for Health or Behavioral Problems

A hardship request for a transfer for severe physical, emotional or social problems will be supported by the written evaluation of a physician, psychiatrist, psychologist, and/or social worker. Written evaluations shall be forwarded to the Director of Special Transfers with necessary documentation attached. All information will be treated as confidential.

4. Hardship Cases or Unusual Situations

Requests based upon extreme hardship or other unusual circumstances must be submitted to the Student Personnel Office of Transfers with written evidence supporting the need for transfer. Each request will receive careful consideration by the Director of Special Transfers and the Transfer Committee.

5. Student Illness

A. If a student becomes ill during transportation to an assigned school, the bus will continue to its destination at which time the student will be referred to the proper school authorities.

B. When a student is too ill to remain in school, it shall ultimately be the responsibility of the local school administration to decide upon the method of transporting the student home.

C. In no case will a student be removed from the school without first notifying the parent or legal guardian. Should this be impossible and the student's health is in jeopardy, the burden of responsibility must necessarily fall upon the local school administration.

D. When possible, parents will be asked to come to the school to pick up the student too sick to remain.

E. School personnel teams (i.e. social workers, counselors, nurse , etc.) will be available in designated areas to retu n a sick student to home or to a hospital emergency room when necessary.

F. In serious emergencies, the present policy of calling the police will continue.

6. Student Attendance

A. The parent or legal guardian bears the primary responsibility for the punctuality and regular attendance of the student. The provisions listed in the Kentucky Revised Statutes will prevail.

B. In the case of a transported student, it is the responsibility of the parent or legal guardian to see that the student gets to the departure point (bus stop) on time.

C. In the event the student misses the bus, the parent should make every attempt to get the student to the assigned school, even though the student may be tardy. As stated in 6-A above, this will be the parent or legal guardian's responsibility.

EMPLOYEE PERSONNEL

The certificated staff who work directly with students at schools will be assigned so that the racial composition of a specific school staff does not indicate that the individual school is intended exclusively for white students or black students. Principals, assistant principals, counselors, instructional coordinators and teachers will be assigned so that the ratio of whites to blacks within these categories in an individual school is roughly equivalent to the black-white staff composition of the school system.

The following rules with reference to the policy regarding administrative staff and teachers of the school system will be followed:

1. Staff members who work directly with students and the professional staff who work on the administrative level will be employed, promoted, paid, demoted, dismissed and otherwise treated equitably without regard to race, sex, color, or national origin. Black teachers and supportive staff, such as counselors and all categories of administrative staff, will be assigned in all areas of the school program to parallel the racial composition of staff in the entire school system.

2. Although classified personnel are not specifically included in the reassignment plan, *Singleton* will apply to this category of personnel. The school system will attempt to ensure through placement procedures that further desegregation occurs within all categories of classified personnel assigned to school buildings and administrative offices.

3. Whenever for any reason it will appear that the minority or majority personnel in particular situations fall below the prescribed racial composition, every effort will be made in new employment and promotion to correct this situation. If there is to be a reduction in the number of principals, teachers, or other professional staff which will result in a dismissal or demotion of any staff members, the staff members to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from the entire staff. In addition, if there is any such dismissal or demotion, all staff vacancies will be filled through the recruitment of a person of a race, sex, color, or national origin that will contribute to and enhance the desegregation of the staff, after each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to do so.

In order to facilitate the implementation of the necessary teacher transfer policy required to carry out the desegregation plan in an equitable manner, consideration will be given to the following: (1) preparation; (2) experience; (3) certification; (4) tenure; and (5) willingness to volunteer.

In effecting teacher transfer, consideration will be given to the following factors: (1) determination of the number of teachers needed in each school; (2) seniority; (3) consideration of other factors, such as transfer to the same grade level as in present assignment, transfer of secondary teachers so far as possible to a subject area matching their expertise, etc.

Bi-racial administrative teams will be assigned, where possible, in the following areas: central office, area or district offices, local schools and special programs.

HUMAN RELATIONS

At the direction of the Court, the Superintendent and professional staff have submitted a Human Relations Program which is made part of this plan as Appendix 2 which the Court has approved and directs be vigorously prosecuted as a part of the implementation of this plan.

TRANSPORTATION

Reference has previously been made, and the Court finds it a fact, that the plan hereby ordered reduces to a minimum the number of students necessary to be transported for the purposes of carrying out the desegregation order of the Court to eliminate all vestiges of state-imposed segregation.

The Court finds as a fact that the Jefferson County School System presently has sufficient transportation equipment to begin the implementation of the transportation provisions of this plan, provided the transportation of

school children in this community is confined by the Jefferson County School System to public school students. There is not adequate transportation equipment available to the Jefferson County School System to complement this Court's plan if non-public school students of this community are transported. The Court has previously determined and announced publicly that the necessities and practicalities require a limitation upon transportation and that no non-public school students will be transported. In order to accomplish the transportation of public school students and to carry out this desegregation plan, the Court finds as a fact that the transportation fleet will be required to operate from early in the morning until late in the evening to carry out the transportation provisions of this plan.

In order to ensure the safety of all children being transported for the purposes of this desegregation plan, monitors shall accompany all students being transported for the purpose of desegregation. The Court finds that as a fact, based upon the evidence supplied by experts in the field of transportation, that the transportation of students from their homes (where required) to the district school in which they reside and from the district school to the assigned school is the most efficient method for reducing the number of pupil miles, for the conservation of equipment and fuel, and for the accomplishment of the minimum amount of transportation commensurate with the Constitutional requirements involved in this plan.

The Superintendent and the staff have supplied the Court with estimated costs of transportation for desegregation purposes based on a maximum load of 50 students. The transportation fleet will be required to make double runs, taking high school students first, and elementary school students later. Transportation will be provided for extra-curricular activities as set forth. A speaker system will be installed for use by teachers involved in first grade class interchange program.

The following transportation schedule for the first quarter of the school year 1975 forms a part of the desegregation plan and will be implemented. Experience may dictate less burdensome or more burdensome transportation schedules which shall be adjusted by the school administration consistent with the spirit of this desegregation plan to achieve the most practical transportation method with the minimum amount of hardship to all students involved.

Transportation Schedule

Middle/Secondary Schools—School Day 8:00 a.m.-2:30 p.m.

A. Morning

Time	*Activity*
7:00 a.m.	Pick up for District School
7:30 a.m.	Transportation to Assigned School

B. Afternoon

2:30-3:00 p.m.	Return from Assigned School
3:00-3:30 p.m.	Transportation to Home

Elementary Schools—School Day 9:00 a.m.-3:00 p.m.

A. Morning

Time	*Activity*
8:30 a.m.	Pick up for District School
8:30 a.m.	Transportation to Assigned School

B. Afternoon

3:00-3:30 p.m.	Return from Assigned School
3:30-4:00 p.m.	Transportation to Home

Students transported to an assigned school from their district school in the school attendance area in which they live will be provided transportation from that assigned school to the district school from which they originated when they choose to participate in extra-curricular activities at the assigned school.

Based on information supplied to the Court, the approximate number of pupils and the daily cost of transportation is as follows:

1. First Grade Pupils (Class Interchange Program)	
a. 9,000 pupils x 22% = 2,000 2,000 pupils x 42¢ per day = $840.00 $840.00 x 120 days =	$ 100,800.00
b. 100 buses x $110.00 per speaker	11,000.00
Total Cost for First Grade	$ 111,800.00
2. Grades 2-11 Pupils	
a. 22,600 pupils x 42¢ per day = $9,492 $9,492 x 175 days =	$1,661,100.00
b. 300 monitors for buses and school duties 8 hrs. x $2.50 = $20.00 per day $20 x 300 = $6,000 per day x 185 days =	1,110,000.00
	$2,771,100.00
3. Extracurricular Activities for Grades 7-11	
a. 30 buses at $12 per day = $360.00 x 175 =	$ 63,000.00
	$ 63,000.00
Estimated Total Cost	$2,945,900.00

INSTRUCTION

The Elective Quarter Plan (EQP) is made a part of this desegregation plan. The following procedures govern the Elective Quarter Plan and student selection of quarters:

1. The Jefferson County School System will begin the Fall Quarter on September 4, 1975, and all public school students will be required to attend.
2. Students being transported in any year for purposes of desegregation must attend their assigned school Fall, Winter, and Spring Quarters and are not eligible for the elective procedures outlined in Section 3 below.
3. All students not being transported for desegregation who desire not to attend the Winter Quarter of the 1975-76 school year must indicate that choice to school officials by October 15, 1975. In the event that the number of students who choose not to attend the Winter Quarter is excessive and/or negatively affects the desegregation plan, the superintendent in consultation with the Court will make attendance mandatory during the Winter Quarter. In the event that the desegregation plan remains balanced without those students attending, they would be free not to attend that quarter.
4. Students who do not choose to attend the Spring Quarter in 1976 must indicate that choice to the school administration no later than January 21, 1976. The superintendent will exercise the options provided by the Court as outlined above and has the Court's authority to determine whether or not the Spring Quarter will be optional for any student.
5. Beginning in the school year 1976-77, students will select the school quarters of attendance by March 12, 1976. Based upon the results of the choices made by the students, the superintendent will exercise the options previously set forth.
6. Students choosing to attend the Summer Quarter, 1976, will report that to school officials by May 14,

1976. Following the collating of that data, attendance areas which will enhance desegregation will be drawn for the Summer Quarter. The availabiiity of air-conditioned facilities in combination with factors relating to desegregation will determine the location of the Summer Quarter schools.

7. Cutoff dates for quarter selection will be published in order that parochial students may be informed. Cutoff dates for selection will govern all students who are residents of Jefferson County as of those dates.

IMPLEMENTATION

The Board of Education of Jefferson County and the Superintendent of Schools of Jefferson County are responsible to the Court for the full, complete and impartial implementation of the desegregation plan hereby ordered. The Court will look to the Superintendent of Schools of Jefferson County to act as the principal administrative and executive officer for this purpose. If the Superintendent determines at any time to establish an implementation team to act for him or in his behalf, he may do so with appropriate public notice.

A United States Magistrate*, in conjunction with the implementation team if designated as stated above will carry out and enforce the provision of this Court's orders and judgments and will serve as Special Master herein, pursuant to the provisions of Title Twenty-Eight U.S.C. 636 (B) of the Federal Rules of Civil Procedure for the United States District Courts.

The United States Magistrate shall have full authority and all powers provided by law to carry out the judgments and decree of this Court and make such reports to the

*The Court may designate a Special Commissioner with identical powers.

Court from time to time as may be necessary, or as the Court may require.

As provided in Title Twenty-Eight, Section 636(D) in any proceeding before the Special Magistrate in this action, any of the following acts or conduct will constitute a contempt of the District Court of the United States for the Western District of Kentucky:

1. Disobedience or resistance to any lawful order, process or writ;
2. Misbehavior at a hearing or other proceeding or so near thereto as to obstruct the same;
3. Failure to produce after having been ordered to do so any pertinent document;
4. Refusal to appear after having been subpoenaed or upon appearing, refusal to take an oath or affirmation as a witness, or having taken the oath or affirmation, refusal to be examined according to law;
5. Any other acts or conduct which is committed before a judge of the District Court which would constitute a contempt of that court.

In addition to the powers and duties conferred, the United States Magistrate, as Special Master in this matter, shall exercise the powers provided by Rule Fifty-three of the Federal Rules of Civil Procedure and may procure the attendance of witnesses in the manner prescribed in 53 (d-2), and may call such hearings to be conducted over which he shall preside, or if necessary, the Magistrate may cause hearings to be conducted by a member of the Bar appointed and designated by the Magistrate to receive evidence. Said Magistrate may, in the manner prescribed by Rule 53, and any hearing officer appointed by the Magistrate rule upon the admissibility of evidence and make such record of the evidence offered and excluded as is provided

by law and may conduct such meetings and hearings as, in the Magistrate's judgment, are necessary, or as may be directed by the Court to carry out the provisions of order and judgment.

MONITORING PROCEDURES

As part of this plan, the Court will order its Special Master to continually monitor the implementation of its desegregation plan. Such Special Master will sit at all Board meetings and express the view of the Court in regard to all matters before the Board which relate to desegregation. In order to ensure the ability of the Court's Special Master to judge whether the plan is being sufficiently implemented, the superintendent is to report the following data to the Court's Special Master beginning October 15, 1975:

1. Planned locations and construction of any new schools or additions to schools, or expansions or reclassifications of existing schools, and a description of how such facilities will relate to the desegregation efforts of the school system.
2. Planned modification of attendance zones within the school system.
3. Description of the status of the training and orientation programs.
4. Status of programs for community education.
5. Number and percentage of students by grade and race in each school, and the systemwide totals by grade and race for elementary, junior, middle and senior high schools within the school system.
6. Number of students by race enrolled in each classroom of the schools of the school system.

7. Number and percentage of teachers by grade (or subject taught) and by race in each school, and the systemwide totals for elementary, junior, middle and senior high schools.
8. Number of principals, assistant principals, counselors, and instructional coordinators by race in the school system and the totals in each category (principals, assistant principals, counselors, and instructional coordinators) within the system.
9. Number of fulltime and parttime paraprofessional and clerical personnel by race in each school and in the administrative offices of the school system and the totals in the school system.
10. Number of tenure teachers by race in each school and the totals of such teachers by race in the school system.
11. Number of substitute teachers by race in the school system.
12. Number of students who dropped out, were suspended, failed, retained, and the number expelled by school, by grade, by race, for the prior year.
13. Number of professional administrators by race in the administrative offices of the school system and the category and job responsibilities of each administrator.
14. Description of progress made in the implementation of any necessary affirmative action program dealing with rectifying racial imbalance in any employment category.
15. Hardship requests approved and disapproved by school, race, grade and category of reason.

ADDITIONAL CONSIDERATIONS RELATIVE TO IMPLEMENTATION AND ENFORCEMENT OF THIS DESEGREGATION ORDER

Safety and Discipline

Normally in civil lawsuits, such as this case, the Court entertains no concern that its final judgment will be fully and in good spirit complied with to the letter. Such is generally true, for though some are always disappointed with the eventual outcome of any litigation, all recognize that it is only through established legal procedures that we can resolve our differences and dwell in safety in our homes and with our possessions.

In this instant matter however certain individuals in our community have publicly declared their intended resistance, by the use of force if necessary to prevent the implementation of our Judgment and Plan of desegregation.

These declarations of resistance have caused inquiry to be made to me by many parents concerned for the safety of their children; seeking to know what actions I intend to take to guarantee the safety of the children affected by my judgment.

In this connection, though I am ever mindful that the majesty and dignity of the law and of this court is not founded upon the use of its power to enforce—but rather upon its courage, fairness and equality of treatment; all persons are entitled to know where I will stand when the safety of their children is at stake. As United States District Judge I will unhesitatingly employ the full power of the United States to guarantee the absolute safety of your children.

This is not a threat; it is a fact, and all persons would do well to believe it.

I say to those who would resort to public disorder and violence—think twice! Remember that contempt of the

orders of United States courts and violations of the Civil Rights of others, be such others black or white, are serious matters, for such invite enforcement procedures by the Court which carry severe and heavy penalties of fines and imprisonment as well as personal civil liability in damages.

Accordingly, the Court thinks it well and necessary in view of developments that the following "rules of the road" so to speak are announced and proscribed in the interest of child safety.

1. Those persons wishing to protest the Court's judgment may in the exercise of their constitutional rights of freedom of speech and assembly do so. Such persons may employ signs or placards, or voice, so long as their actions are not violent, are not profane, and are not threatening in nature, and provided further; that those persons occupy the protest areas to be designated and defined at each school by the United States Marshal in charge, or the police officers in attendance. Such fixed areas shall be in proximity to the schoolhouses in question but not so close thereto as to impede school activities nor to be frightening to those who wish to avail themselves of school facilities. In the event however; in the sole judgment of the United States Marshal, or ranking police official in charge, that any such protest is being conducted in violation of any of the above standards of conduct herein fixed for persons protesting such officer is hereby specifically authorized in this Court's name to order the dispersal and disbanding thereof. Any protestor refusing his order shall be then subject to federal custody and federal enforcement procedures.

2. Parents must understand that under the law they are legally responsible for the acts of their children and both parents and children are subject to the judgment and orders of this Court and the acts of our national Congress protecting the Civil Rights of others.

3. Matters of student discipline as to purely school management may not be subject to the purview or judgment of this Court unless, and until, such breaches thereof reach the proportions of violation of our desegregation judgment and plan, or result in a denial of the constitutional rights of other students, black or white. Such breach so occurring the principal in charge of any school or any teacher thereof, any bus driver, or any person in the position of bus monitor is hereby authorized, yea obligated, to forthwith suspend said student from attendance at any school and to order in the Court's name that such student vacate the premises or bus in question immediately, upon pain of federal custody and federal enforcement procedures. Any student so suspended may thereafter request of this Court and receive by it, or its Special Master, a hearing as to the propriety and fairness of such suspension action so taken and the Court's judgment pursuant to such hearings shall be binding and conclusive thereof.

4. No parent or guardian shall present any child for enrollment for the school term of 1975-76 without the clear understanding that such presentation and enrollment carries with it the parental consent and authority to all provisions of our judgment and desegregation plan pertaining to the assignment or transportation of students. Any violation hereof subjects one to federal custody and federal enforcement procedures.

In this connection the Court invites the public's attention to the possible violation of state laws by parents or guardians who boycott or fail to present their children for public school education.

5. No person shall by the use of any automobile, or otherwise, attempt to block or impede the authorized flow of traffic in, to, or from any school building property; nor shall any person, not authorized by his official position,

attempt to enter upon or board any school bus either to place thereon or remove therefrom any enrolled student; nor shall any person threaten to or impede the right of any enrolled student to walk to, from, or into, any school facility when said student is about the business of attending school or walking in return to his home following school hours. Violations hereof will subject one to federal custody and federal enforcement proceeding.

6. No person shall interfere with, nor cause threats to be made, or unlawful pressures to be exerted, against any employee of the school system or members of their families, or school board member, or volunteer, intended or directed toward the prevention of the performance of their official duty by them, or intended in any manner to prevent their carrying out and complying with the desegregation judgment and plan of this Court.

Appendix 1-A

ELEMENTARY CLUSTERS

Grade Centers	B	W	% Black
Price (Gr. 1-2)	126	327	28
Hartstern (Gr. 3-4-5)	173	502	26
Cane Run (Gr. 1-2-3)	176	364	33
Schaffner (Gr. 4-5-6)	175	423	29
Rangeland (Gr. 1-2-3)	110	500	13
Luhr (Gr. 4-5-6)	85	435	16
Cluster #1			
Brandeis	194	458	30
Coral Ridge	64	348	16
Fairdale Elem.	79	439	15
Filson	87	477	15
Minors Lane	90	496	15
Okolona	98	498	16
Cluster #2			
Byck	146	578	20
Dunn	143	544	21
Greathouse	71	274	21
Hawthorne	50	194	20
Stivers	71	278	20
Cluster #3			
Carter	163	404	29
Greenwood	75	437	15
Johnsontown	82	450	15
Sanders	77	447	15
Wilkerson	76	433	15
Conway (Grade 6)*	36	211	15
Cluster #4			
Coleridge-Taylor	218	542	29
Bowen	86	452	16
Lowe	92	485	16

Grade Centers	B	W	% Black
Morton	134	604	18
St. Matthews	71	373	16
Wilder	106	563	16
Kammerer (Grade 6)*	38	202	16
Cluster #5			
Foster	157	363	30
Crums Lane	82	346	19
Shacklette	86	434	17
Waller	89	450	17
Wellington	86	414	17
Williams (Grade 6)*	28	134	17
Cluster #6			
Jones	123	324	28
Bates	123	533	19
Fern Creek Elem.	129	555	19
Cluster #7			
J. F. Kennedy	272	571	32
Dixie	74	356	17
Layne	88	426	17
Medora	109	501	18
Stonesfreet	100	470	18
Valley Elem.	97	458	17
Watson Lane	105	475	18
Frost (Grade 6)*	33	156	17
Cluster #8			
King	181	398	31
Gutermuth	86	425	17
Jacob	83	411	17
Semple	105	537	16
Trunnell	112	572	16
Cluster #9			
Lincoln	144	567	20
Hite	96	416	19

Grade Centers	B	W	% Black
Middletown	140	556	20
Zachery Taylor	113	493	19
Crosby (Grade 6)*	47	194	20
Cluster #10			
McFerran	192	494	28
Blake	80	440	15
Blue Lick	89	495	15
Laukhuf	106	587	15
Wilt	94	515	15
Knight (Grade 6)*	48	267	15
Cluster #11			
Parkland	201	443	32
Auburndale	104	498	17
Kenwood	96	444	18
Rutherford	122	526	19
South Park	74	334	18
Lassiter (Grade 6)*	58	277	17
Cluster #12			
Perry	85	239	26
Cochran	66	291	18
Frayser	91	425	18
Lowell	100	458	18
Cluster #13			
Shawnee	196	471	29
Bloom	68	323	17
Camp Taylor	73	350	17
Chenoweth	98	418	19
Field	65	308	17
Franklin	71	306	19
Gilmore Lane	95	445	18
Cluster #14			
Strother	127	340	27
Belknap	71	331	18

Grade Centers	B	W	% Black
Klondike	112	536	17
Shryock	81	388	17
Cluster #15			
Wheatley	178	502	26
Cochrane	93	514	15
Jeffersontown Elem.	99	493	17
Kennedy, A.	94	518	15
Wheeler	98	565	15
Carrithers (Grade 6)*	43	233	16
Cluster #16			
Young	234	461	34
Eisenhower	97	417	19
Goldsmith	108	463	19
Kerrick	95	421	18
Prestonia	79	347	19
Smyrna	127	553	19

*Grade 6 in these middle schools is included in the elementary clusters. Grade 7 and 8 are in the middle and junior high school clusters.

Appendix 1-B

SECONDARY CLUSTERS

Middle and Junior High Schools, Grades 7 and 8

Grade Centers	B	W	% Black
Cluster #1			
DuValle (7-9)	144	661	18
Durrett (7-8)	80	335	19
Southern (Co.) 7-8	111	468	19
Iroquois (7-9)	101	426	19
Highland (7-9)	132	526	20
Lassiter (6-8)	124	521	19
Knight (6-8)	64	267	19
Fairdale (7-8)	165	692	19

Grade Centers	B	W	% Black
Cluster #2			
Meyzeck (7-9)	96	623	13
Ballard (7-8)	55	211	21
Kammerer (6-8)	54	202	21
Crosby (6-8)	50	194	20
Eastern (7-8)	44	167	21
Waggener (7-8)	164	612	21
Westport (7-8)	161	610	21
Cluster #3			
Parkland (7-9)	136	556	20
Jeffersontown (7-8)	147	492	23
Fern Creek (7-8)	157	552	22
Carrithers (6-8)	162	540	23
Barrett (7-9)	85	300	22
Moore (7-8)	227	747	23
Cluster #4			
Shawnee (7-9)	139	666	17
Doss (7-8)	91	387	19
Pleasure Ridge Park (7-8)	141	600	19
Stuart (7-8)	156	663	19
Valley (7-8)	97	413	19
Conway (6-8)	109	465	19
Frost (6-8)	80	341	19
Williams (6-8)	73	311	19

SENIOR HIGH SCHOOLS
Grades 10-11

Grade Centers	B	W	% Black
Cluster #1			
Central (10-12)	159	954	14
Atherton (10-12)	127	639	17
Ballard (9-12)	151	758	17
Waggener (9-12)	138	707	16
Westport (9-12)	116	584	17

Grade Centers	B	W	% Black
Eastern (9-12)	118	562	17
Jeffersontown (9-12)	148	737	17
Seneca (9-12)	126	634	17
Cluster #2			
Male (10-12)	86	747	10
Durrett (9-12)	122	533	19
Southern (Co.) (9-12)	160	744	18
Moore (9-12)	148	687	18
Fern Creek (9-12)	126	562	18
Cluster #3			
Shawnee (10-12)	123	724	15
Doss (9-12)	129	655	16
Pleasure Ridge Park (9-12)	138	697	17
Stuart (9-12)	122	597	17
Valley (9-12)	134	646	17
Fairdale (9-12)	128	649	16

ORDER DISPENSING WITH HEARING ON PROPOSED DESEGREGATION PLAN

ADVICE TO THE COURT

In order to obviate the necessity of further hearings in this matter, and the resulting delays attendant therewith, and further in view of the fact that time is now of the essence by virtue of the holding of the Sixth Circuit Court of Appeals this day entered, directing full implementation of a desegregation plan this coming September in Jefferson County, the parties in this litigation acquiesce to a judgment by the Court upon the pleadings and the entire record herein, without the necessity of further hearing, that he may impose and pronounce a desegregation plan for Jefferson County. Nothing contained herein shall be interpreted to prejudice the right of any party to perfect and

prosecute an appeal from any order composed and directed by Judge Gordon pursuant hereto.

For the Plaintiffs
(s) Robert Allen Sedler

For the Defendants
Jefferson County Board of Education
By (s) Don M. Randolph
Chairman

Attest: (s) E. Grayson
Secretary

RESOLUTION

WHEREAS, since March 31, 1975, the United States District Court permitted former members of the Jefferson County Board of Education and former members of the Louisville Board of Education to retain their separate identities solely for the purpose of pending desegregation litigation, and

WHEREAS, members of the Jefferson County Board of Education desire to seek a stay of the recent action of the Court of Appeals and to seek certiorari to the Supreme Court from any judgment entered by Judge Gordon and apply for all appropriate stays, and

WHEREAS, members of the former Louisville Board of Education earnestly believe that continued legal action is not in the best interest of the children of the community, and

WHEREAS, former members of the Louisville Board of Education do not desire to be the instrument which would prevent any rightful access by the Jefferson County Board of Education members to the Courts, and

WHEREAS, the Jefferson County Board of Education members believe it in the best interest of the community

at large to prosecute appeals to the highest court of the land,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY

1. Counsel is authorized to proceed expeditiously to apply for all appropriate stays, appeals, or petitions for certiorari in the name of the Board of Education of Jefferson County, Kentucky;

2. Counsel for the five (5) former members of the Board of Education of Louisville, Kentucky, is authorized to resist any application for a stay, petition for certiorari, or appeal;

3. Certified copies of this resolution shall be attached to any application for a stay, petition for certiorari, or appeal; and

4. Counsel will give notice to counsel for the five (5) former members of the Board of Education of Louisville, Kentucky, and all other appropriate parties of any actions taken as provided by law.

CERTIFICATION BY THE SECRETARY OF THE BOARD OF EDUCATION

It is certified that the foregoing resolution came on for a vote on July 28, 1975, before the Board of Education of Jefferson County, Kentucky, at a regular meeting and the motion was carried by a vote as follows:

Don Randolph	Yea
Orville Miller	Yea
Fred Pfannenschmidt, Jr.	Yea
Mrs. Jean Ruffra	Yea
Mrs. Roberta B. Tully	Yea
Scott Detrick	Yea
Dr. John P. Bell	Abstained
Carl R. Hines	Abstained
Mrs. Carolyn G. Hutto	Abstained
William E. Summers, III	Abstained

I, Ernest C. Grayson, Superintendent and Secretary of the Board of Education of Jefferson County, Kentucky, certify that this is a true and correct copy of the action taken by the Board of Education of Jefferson County, Kentucky, on July 28, 1975.

_____

SEAL

Certified to be a true copy of business duly adopted by the Board of Education of Jefferson County, Kentucky, on the ____ day of _____, 1975, and is on record in the official Minute Books of said Board of Education.

_____

JUDGMENT, MEMORANDUM OPINION AND ORDER, AUGUST 2, 1976

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Civil Action No. 7045-L(G)

NEWBURG AREA COUNCIL, INC., et al. - - - *Plaintiffs*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - - - - - - *Defendants*

AND Civil Action No. 7291-L(G)

JOHN E. HAYCRAFT, et al. - - - - - - - *Plaintiffs*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al. - - - - - - - - - *Defendants*

JUDGMENT

For all of the reasons stated in the Memorandum Opinion of this day, the Court hereby makes an express determination that there is no just reason for delay and the Court hereby directs the Clerk of the Court to enter this as a final and appealable judgment.

It is hereby ordered and adjudged that:

1. The report of the committee appointed by the Court on May 4, 1976, is approved except we reserve all questions concerning compliance with *Singleton* until a later time.

2. The desegregation plan and Judgment entered July 30, 1975, is amnded to conform with the recommendation of the committee that busing assignments for black elementary school students be made under the same formula employed in assigning black secondary students, thereby increasing black student participation in the busing plan by approximately 900.
3. The committee's recommendation that hardship transfers for LD - EMH children be handled under the same procedure as other hardship transfer requests is approved.
4. Superintendent Grayson is instructed to appoint Mr. Herb Severs as one of the five persons who constitute the hardship transfer committee. Mr. Severs will act as the plaintiffs' representative on this committee and shall have the right to recommend to the plaintiffs' lawyers that an appeal be taken from any decision made by the committee concerning a hardship transfer request which he believes is adverse to the plaintiffs' interests. Mr. Severs shall serve on the hardship committee without being remunerated for his services.
5. All individuals who appeal decisions from the hardship transfer committee must exhaust their administrative appeals before seeking judicial review of the matter.
6. The five elementary schools which the Board of Education determined should be closed shall remain open and they will be utilized in the manner set forth in the committee's report, which the Court assumes is the manner in which they were utilized during the 1975-76 school year.
7. The voluntary transfer plan, as recommended by the school board and the superintendent, and the con-

version to the maddle school concept, as recommended, is approved and made a part of the desegregation plan. It is specifically provided, however, that no child shall have the option under the four quarter system of failing to attend the fall quarter for September, 1976.

Dated: August 2, 1972

(s) James F. Gordon
Senior United States District Judge

Copies to:
All counsel of record.

MEMORANDUM OPINION AND ORDER

On May 3, 1976, an evidentiary hearing was held to determine, *inter alia*, whether there had been compliance during the 1975-76 school year with this Court's desegregation order of July 30, 1975. Specifically, it was the Court's understanding that if the statistical evidence presented during the hearing demonstrated the student population ratio in the schools, or some of them, was not in conformance with our guidelines, the Jefferson County Board of Education, hereinafter school board, through its staff, would make recommendations which would result in a student population consistent with our desegregation order.

Upon hearing several of the school board's witnesses it was evident the pupil population ratio in at least twenty-eight elementary schools was not in compliance with our guidelines,[1] although the student population within the secondary schools did conform to our desegregation order. Significantly, the school board's recommendations as to the elementary school system for school year 1976-77 would not

[1]The number may be greater than twenty-eight schools because eighteen to twenty elementary schools were not examined by the school board's staff.

have brought that system within the guidelines announced by the Court on July 30, 1975.

In addition the school board through its staff had, in fact, compounded an already difficult situation. In March, 1976, the school board and its staff convinced the Court that a swift determination was needed as to whether first graders would participate in the busing pattern for school year 1976-77. We concluded that first graders would be exempted from the busing requirements for school year 1976-77 principally on the assurance of the school board's staff that such an exemption would only have a de minimus effect on bringing the elementary schools into compliance with our guidelines. Nothing was further from the truth. When the Court questioned Mrs. Wilma Berlin, one of the school board's demographic experts, during the May 3rd hearing concerning several of the schools which were strikingly outside the guidelines, she answered that the exemption of first graders was the problem.

The school board also recommended that five elementary schools (Belknap, Roosevelt, Greathouse, Jones and Foster) be closed. The Court determined that in every instance the proposed closing of one of these five schools would have either a minimal or adverse effect upon the goal which we have been directed to achieve, which is the removal of all remaining vestiges of state imposed segregation from the Jefferson County School District.[2]

Because the elementary school system in Jefferson County had *never* ben in compliance with this Court's desegregation decision, we ordered that Deputy Superintendent Milburn Maupin chair a five person committee, hereinafter termed committee, and directed the committee to re-examine the elementary school system in Jefferson

[2]The Court subsequently learned that the school board had recommended closing these five schools notwithsanding it knew, or should have known, that many other elementary schools were overcrowded.

County and to develop for the Court a methodology of plan through reclustering, pairing, or what-have-you to bring all elementary schools within the ambit of our desegregation order, insofar as humanly possible, considering the encumbrance of the first grade exemption.

In the interval between our order establishing the committee and the present the Supreme Court issued an opinion in *Pasadena City Board of Education* v. *Spangler*, ___ U. S. ___, 44 U.S.L.W. 5114 (June 28, 1976), hereinafter *Pasadena*. Because of the *Pasadena* decision we must first determine whether we had the judicial authority to establish the committee, whose purpose was to re-examine and readjust the elementary school system so as to bring that system, insofar as is possible, within the pupil population guidelines.

On January 23, 1970, the District Court in the *Pasadena* case entered its desegregation order. The order required that the desegregation plan submitted by the defendant school board include a requirement that students be assigned in such a manner that no school within the district would have a majority of any minority students, hereinafter termed the "no majority" requirement. The desegregation decree was not appealed by the Pasadena school officials.

Notwithstanding the desegregation order "literal compliance with the terms of the court's order had been obtained in only the initial year of the Plan's operation." *Id.* at 5116. In other words, only during the 1970-71 school year was the "no majority" requirement achieved. In January, 1974, a motion was filed seeking relief from the District Court's 1970 order. The movants asked, among other things, to be relieved of the "no majority" requirement. The District Judge denied the motion in its entirety and a divided panel on the Ninth Circuit Court of Appeals affirmed that decision. The Supreme Court vacated the appellate court's judgment and remanded the case to the Ninth Circuit.

The only issue before the Supreme Court was: "whether the District Court was correct in denying relief when petitioners in 1974 sought to modify the 'no majority' requirement as then interpreted by the District Court."[3] *Id.*

Concluding that the District Court's decision conflicted with *Swann* v. *Board of Education*, 402 U. S. 1 (1971), the Court wrote:

> It became apparent, at least by the time of the 1974 hearing, that the District Court viewed . . . [the "no majority" requirement] not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be appropriate; . . ., but instead as an "inflexible requirement," . . ., to be applied anew each year to the school population within the attendance zone of each school.

Pasadena, supra at 5117.

The Court also quoted this important language found in *Swann, supra* at 31-32:

> It does not follow that communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished* and racial discrimination through official action is eliminated from the system.

Pasadena, supra at 5117 (Emphais added).

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[3]Judge Real made it clear during the 1974 hearing that the "no majority" requirement mean exactly what it says—"that at least during . . . [Judge Real's] lifetime there would be no majority of any minority in any school in Pasadena." 44 U.S.L.W. at 5116.

Given the facts of *Pasadena* and the analysis applied in the majority opinion it is patent that this case is distinguishable. One key analytical distinction between the two cases is that *Pasadena* was in the *post-compliance stage* when Judge Real instructed the school board to make annual readjustments in the attendance zones so as to meet the "no majority" requirement; whereas, this case is in the *pre-compliance stage* at least insofar as bringing the entire elementary school system into conformity with our guidelines.[4]

The dissenting opinion issued by Mr. Justice Marshall specifically recognized the majority's analysis was premised on the fact that Judge Real's decision was made during the post-compliance stage. Justice Marshall stated:

> The Court's conclusion that modification of the District Court's order is mandated is apparently largely founded on the fact that during the Pasadena Plan's first year, its implementation did result in no school having a majority of minority students. According to the Court, it follows from our decision in *Swann, supra,* that as soon as the school attendance zone scheme had been successful, even for a very short period, in fulfilling its objectives, the District Court should have relaxed its supervision over that aspect of the desegregation plan.

Id. at 5119.

Logic dictates that *Pasadena* can only be applied in a post-compliance setting. It would certainly be a new era in federal court jurisprudence if the Supreme Court determined that a District Court did not have the *authority* to modify the student assignment portion in a desegrega-

[4]Again we note that at least twenty-eight of one hundred and one elementary schools were not in compliance with our student population guidelines during school year 1975-76.

tion plan which had *not,* as of the time the modifications were ordered, brought about the desegregation of the school system. In this case our July 30, 1975, order did not bring about the desegregation of the elementary schools in Jefferson County because in at least twenty-eight schools the student population did not fall within our guidelines; hence, this Court has the authority to modify the student assignment section in its desegregation order concerning the elementary schools to insure that the mandate directed to us is accomplished.

Having determined that *Pasadena* is distinguishable for the forestated reason, we need not address whether *Pasadena* applies to a case where the demographic changes were the product of a desegregation order,[5] nor do we need to consider whether certain actions and positions taken by the school board and its staff constituted segregative actions, which if found to exist would certainly cause this case to fall outside the scope of *Pasadena. Id.* at 5117.

While *Pasadena* concerns the District Court's authority[6] to require yearly modifications in student assignments in order to insure a certain racial ratio is maintained in the school system, that case does not address an entirely separate yet closely related issue. That question, which con-

[5]The Supreme Court specifically did not decide whether a different decision would have been reached had the demographic changes in the Pasadena Unified School District been the result of "white flight," 44 U.S.L.W. at 5117, however, Mr. Justice Marshall stated in his dissent: "[T]he Court intimates that it would view this case differently if the demographic changes were themselves a product of a desegregation order." *Id.* at 5120 n.2. In this case Professor James S. Coleman, lead witness for the intervenor L. J. Hollenbach III, testified on May 4, 1976, the demographic changes in this school district during school year 1975-76 were caused by "white flight."

[6]In *Pasadena* the Court held: [W]e think that in enforcing its [1970] order so as to require annual readjustments of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court *exceeded its authority.* 44 U.S.L.W. at 5117 (Emphasis added).

cerns a court's discretion rather than its authority or power, is: Having concluded the district court has the authority to modify the student assignment portion of its desegregation order, the modifications being necessary to bring a school system into *initial* compliance, should the court in its discretion exercise that authority? It is that inquiry which *Mapp* v. *Board of Education of City of Chattanooga,* 525 F. 2d 169 (6th Cir. 1975) *cert. denied* 44 U.S.L.W. 3754 (June 29, 1976) is directed.

In *Mapp* the Sixth Circuit held that the District Court did not abuse its discretion in refusing to modify the student assignment portion of its desegregation order even though the actual implementation of the desegregation plan did not achieve the expected racial balance in two of Chattanooga's four high schools. It is very difficult to superimpose one desegregation case upon another for even if the cases appear similar on their face the various mathematical formulae which constitute the heart of every plan, and especially the student assignment portion thereof, are tailored to meet the locality's needs; hence, all desegregation plans are in fact as varied as the fish in the sea. For the reasons hereinafter discussed we do not believe we have abused our discretion in requiring the same formula to be used in assigning black elementary school students as was used in school year 1975-76, and will be used thereafter in the assignment of black secondary school students. In truth it is our belief that had we refused to order this minor and easily adapted modification in the student assignment fomula for black elementary school students we would have abused our discretion.

Since the time the Court orally approved the committee's report a group known as Black Protective Parents has sought, and been allowed, to intervene in this case on the question of whether the committee's recommendation of busing 900 additional black elementary students should be approved. On July 2, 1976, the Court held a hearing on

this question at which time two members of the intervening group, Benetha Ellis and Reverend Charles Elliott, were called to testify. We have fully considered the arguments advanced by the intervenor, especially the suggestion that the Court order some additional white students and some additional black students to be bused rather than 900 black students and no white students. Nothwithstanding these arguments we must reaffirm our approval of the committee's report.

It is important to recognize that the committee's recommendation to bus 900 additional black elementary students derives from the fact the committee agreed the same formula which is applied in busing black secondary school students should apply to black elementary school students. Under this formula black pupils are divided into six approximately equal alphabetical groups. During this past school year at the secondary school level five of the six alphabetical groups of black students were subject to busing assignments whereas at the elementary school level only four of the alphabetical groups were transported. In an initial draft of the original desegregation order the same formula (using five of the six alphabetical groups) was applied to both elementary and secondary schools. The formula for elementary schools was subsequently changed so that busing assignments for black students took only four of the six alphabetical groups because the demographic experts at that time believed the student population guidelines could be achieved at the elementary level under that formula. We now know they were wrong. Yet, it is significant to remember that the Court's approval of the committee's recommendation to bus 900 additional black elementary students merely adopts the same formula at the elmentary level that was successfully used at the secondary level during school year 1975-76; and, it is also only the

adoption of the formula which should have been included in the original desegregation order.

The Reverend Elliott asked the Court to consider a plan which would require the busing of some additional white students and some additional black students rather than all black students and no white students. If we were not dealing with an extremely complex situation that solution would be quickly accepted by the Court. But to adopt Reverend Elliott's suggestion would require drastic revisions in the present plan, thus doing violence to two of the Court's criteria: stability and predictability.

The examples of the difficulty and complexity of this situation demonstrate the reason why the Court cannot accept Reverend Elliott's recommendation. An additional year of busing could be assigned to one letter in each alphabetical group of white students. Apart from several mathematical problems, this would produce inequity between pupils in the same alphabetical group. If, for example, in alphabetical group M O T U V Y, letter "M" was assigned grades 2, 4 and 9 for transportation years while other letters were assigned grades 4 and 9 only, this would be inequitable. As another example, an entire alphabetical group could be given an additional busing year. In the grade affected by this kind of assignment, pupils would be present out of proportion to other grades. In a school such as Brandeis, the second grade would be larger and whiter than other grades, leaving the rest of the school out of balance. In short, the only alternative the Court actually had was busing an additional 900 black students *or* 3500-4000 additional white students.

Beside the reasons already stated for deciding to bus 900 additional black students rather than 3500-4000 additional white students other justifications are (1) the increased financial burden which would be incurred had the Court decided to bus the white children rather than the

black students[7] and (2) busing that number of additional white students to the city schools would lead to overcrowded conditions in many of the elementary schools.

The Maupin Committee also considered the hardship transfer system. Three separate questions concerning the hardship transfer procedure and system must be decided. They are: (1) What administrative procedure shall be used in processing hardship transfers for LD-EMH "resource room" students? (2) Shall a plaintiffs' representative be placed on the hardship committee, and, if so, what shall be his rights and responsibilities? (3) Must all appeals from decisions of the hardship committee proceed through the normal administrative appeal process? We shall consider each query in the order set forth above.

The committee recommended that future hardship transfer requests for LD-EMH "resource room" students be handled in the same administrative manner as other hardship transfer requests. Superintendent Grayson has submitted an alternative proposal. This alternative proposal is similar to the procedure used in school year 1975-76 in processing these requests by LD-EMH "resource room" pupils for hardship transfers. Having carefully considered both proposals the Court shall adopt the committee's recommendation.

The committee also recommended the placement of a plaintiffs' representative on the hardship transfer committee. We approve this recommendation and instruct Superintendent Grayson to appoint Mr. Herb Severs, an employee of the Kentucky Commission on Human Rights, as one of the five members who constitute the hardship transfer committee. We are also informed that Mr. Severs has agreed

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[7]Had the Court required the busing of 3500-4000 additional white students the increased busing cost would be approximately $319,068.75; whereas, the increased busing costs for the additional 900 black students is $80,325.00.

to be a member of this committee without being remunerated for his services.

As the plaintiffs' representative on the hardship transfer committee Severs will be accorded the same rights and be expected to perform the same duties as any other committee member. He will also have the duty to recommend to the plaintiffs' attorneys that an appeal be taken from *any* decision[8] made by the committee regarding a student transfer request when he believes the committee's decision is adverse to the plaintiffs' interests.[9] We must emphasize that Severs' role as plaintiffs' representative ends with the recommendation to the plaintiffs' lawyers that an appeal should be taken. Severs cannot personally prosecute these appeals because he is not a lawyer and such action on his part, if we allowed it, would constitute the unauthorized practice of law.

We also believe that *any* appeal taken from a decision of the hardship committee must follow the normal appeal procedure. In other words, in *any* appeal from a hardship committee decision all administrative remedies must be exhausted before the party seeks review from the Special

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[8]We assume most, if not all, appeals perfected by the plaintiffs will be from decisions of the committee which grant hardship transfer requests; however, the plaintiffs, if they deem their interests are threatened, may also appal from a decision which denies a hardship transfer request.

[9]The right of recommendation applies only to decisions which are considered adverse to the plaintiffs' interests (generally decisions granting the transfer) because if a hardship transfer request is denied the applicant and the applicant's parents have a sufficient interest to prosecute their own appeal; however, after a decision to grant a hardship transfer has been issued the applicant will obviously not perfect an appeal and last year's experience in this area shows these decisions granting a hardship transfer are rarely, if ever, appealed by school officials. Thus, the group which has the greatest interest in determining whether a decision granting a hardship transfer was properly made is the plaintiffs. The recommendation by Severs that an appeal should be taken merely insures the plaintiffs are provided the information which is necessary for the plaintiffs to decide if an appeal should be prosecuted.

Master. There are various salutary reasons for requiring disgruntled applicants to exhaust their administrative remedies before seeking judicial relief. One of the chief reasons is that it allows school officials rather than the Court to correct any error which has been made by other school officials at lower administrative levels. Having required applicants to exhaust their administrative remedies before turning to the Court, we also instruct all decision makers in the administrative appeal process to act on the appeals as expeditiously as is legally possible to insure the student involved in attending the proper school.

Wherefore, for the foregoing reasons, it is hereby ordered:

1. The report of the committee appointed by the Court on May 4, 1976, is approved except we reserve all questions concerning compliance with *Singleton* until a later time. The Clerk of the Court is directed to attach a copy of the committee's report to this Memorandum Opinion.

2. The desegregation plan and Judgment entered Juily 30, 1975, is amended to conform with the recommendation of the committee that busing assignments for black elementary school students be made under the same formula employed in assigning black secondary students, thereby increasing black student participation in the busing plan by approximately 900.

3. The committee's recommendation that hardship transfers for LD-EMH children be handled under the same procedure as other hardship transfer requests is approved.

4. Superintendent Grayson is instructed to appoint Mr. Herb Severs as one of the five persons who constitute the hardship transfer committee. Mr. Severs will act as the plaintiffs representative on this committee and shall have the right to recommend

to the plaintiffs' lawyers that an appeal be taken from any decision made by the committee concerning a hardship transfer request which he believes is adverse to the plaintiffs' interests. Mr. Severs shall serve on the hardship committee without being remunerated for his services.

5. All individuals who appeal decisions from the hardship transfer committee must exhaust their administrative appeals before seeking judicial review of the matter.

6. The five elementary schools which the Board of Education determined should be closed shall remain open and they will be utilized in the manner set forth in the committee's report, which the Court assumes is the manner in which they were utilized during the 1975-76 school year.

7. The voluntary transfer plan, as recommended by the school board and the superintendent, and the conversion to the middle school concept, as recommended, is approved and made a part of the desegregation plan. It is specifically provided, however, that no child shall have the option under the four quarter system of failing to attend the fall quarter for September, 1976.[10]

And, there being no just reason for delay, the Clerk of the Court is directed to enter a final and appealable judgment from this Memorandum Opinion and Order.

Dated: _____

(s) James F. Gordon
Senior United States District Judge

Copies to:
All counsel of record.

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[10]While several of these matters may not have been addressed by the committee, the Court believes they should be finalized and thus we have included them in this Memorandum Opinion and Order.

SLIP OPINION, AUGUST 23, 1976

Nos. 75-2032, 75-2188, 76-1413, 76-1414

UNITED STATES COURT OF APPEALS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

FOR THE SIXTH CIRCUIT

CYNTHIA CUNNINGHAM and RICHARD N. MORGAN, - - - - *Plaintiffs-Appellants,*

v.

ERNEST GRAYSON, JEFFERSON COUNTY BOARD OF EDUCATION, ET AL., - - *Defendants-Appellees.*

NEWBERG AREA COUNCIL, INC., SARAH WHITE, JOHNIE MAE WRIGHT, and SUZANNE POST, and JOHN E. HAYCRAFT, ET AL., - *Plaintiffs-Appellees,*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, - - - - *Defendant-Appellant,*
L. J. HOLLENBACH, III, County Judge, - *Intervenor.*

JOHN E. HAYCRAFT, ET AL., - *Plaintiffs-Appellees,*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, - - - - *Defendant-Appellant.*

(Continued)

JOHN E. HAYCRAFT, ET AL., - *Plaintiffs-Appellants,*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL., - - - - *Defendants,*

ANCHORAGE INDEPENDENT SCHOOL DISTRICT and ELIZABETH EWING, SUPERINTENDENT, - *Intervening Defendants-Appellees.*

Decided and Filed August 23, 1976

Before: PHILLIPS, Chief Judge, and PECK and McCREE, Circuit Judges.

PECK, Circuit Judge, delivered the opinion of the Court in which PHILLIPS, Chief Judge, joined. McCREE, Circuit Judge (pp. 14-15) filed a separate opinion, concurring in part and dissenting in part.

PECK, Circuit Judge. On December 28, 1973, this court reversed the district court's dismissal of plaintiffs' (No. 75-2188) separate complaints designed to desegregate purportedly dual school systems in Louisville and Jefferson County. We remanded to the district court with directions to eliminate "all vestiges of state-imposed segregation," caveating that "state-created school district lines shall impose no barrier." 489 F. 2d 925, 932. After the Supreme Court vacated the opinion of December 28, 1973, in light of *Milliken* v. *Bradley,* 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), this court on December 11, 1974, reinstated (with minor modifications) its opinion of December 28, 1973. 510 F. 2d 1358. The Supreme Court denied certiorari. 421 U. S. 931, 95 S. Ct. 1658, 44 L. Ed. 2d 88 (1975).

The Kentucky State Board of Education on February 28, 1975, ordered the merger of the Jefferson County and Louisville boards of education, effective April 1, 1975, but because of the boards' "different views and positions as to

the type and nature of the desegregation plan [the district court] should order, if any," the district court on March 31, 1975, directed the Jefferson County Board of Education (JCBE) and Louisville Board of Education (LBE) to "retain their [pre-April 1, 1975] legal identities" for the desegregation litigation.

JCBE and LBE filed separate desegregation plans with the district court, but on July 30, 1975, the district judge, rejecting the parties' proposals as being constitutionally insufficient, formulated his own desegregation plan. In order to insure black enrollments in the 20 per cent black system in each elementary school of between 12 and 40 per cent and in each secondary school of between 12.5 and 35 per cent, the district judge required pupil transportation from district (neighborhood) schools to assigned schools ("busing"). The plan exempted black and white pupils attending sixteen elementary and twelve secondary schools within the racial guidelines from being bused. The plan also, *inter alia,* ordered the closing of twelve schools, provided for racial balance in teacher and administrative assignments, and exempted from busing pupils participating in certain programs, such as Headstart, alternative schools, teenage parents, and rehabilitation schools, JCBE has appealed from the desegregation order (No. 75-2188), and from a district court order requiring it to pay $60,000 to various plaintiffs' attorneys as attorneys' fees (No. 76-1413).

Consolidated with Nos. 75-2188 and 76-1413 in the instant opinion are plaintiffs' appeal from a district court order dismissing intervening defendant Anchorage Independent School District (AISD) (No. 76-1414), and the appeal of two white pupils, subject to the district court busing plan, from the district court dismissed of their civil rights complaint (No. 75-2032). We affirm in all four appeals.

The Desegregation Order (No. 75-2188)

JCBE claims that the district judge erred in imposing the desegregation plan of July 30, 1975, because the plan exceeds the violation, purportedly being limited in pre-merger Jefferson County to three schools; because the district judge imposed "arbitrary racial ratios" rather than using the systemwide racial composition as a "starting point" in formulating the plan; and because the plan inequitably burdens blacks in general, some blacks more than other blacks, and some whites more than other whites by "busing" blacks more than whites, some blacks (nine years) more than other blacks (eight years), and some whites (two years) more than other whites (one year).[1] At oral argument, JCBE contended that the district judge erred in rejecting its desegregation plan, the Jefferson Education Trip (JET), as constitutionally inadequate. However, we find no error in rejecting JET and no abuse of the remedial discretion of the district judge in imposing his desegregation plan.

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[1]Moreover, as already noted, black and white pupils attending sixteen elementary schools 12 to 40 per cent black and twelve secondary schools 12.5 to 35 per cent black are totally exempt from being bused. Yet such exemptions of pupils attending such already desegregated schools are commonplace in desegregation plans. *E.g.*, *United States* v. *School Dist. of Omaha*, 521 F. 2d 530, 546-547 (8th Cir.), *cert. denied*, ____ U. S. ____, 96 S. Ct. 361, ____ L.Ed. 2d ____ (1975); *Clark* v. *Board of Educ.*, 465 F. 2d 1044 (8th Cir. 1972), *cert. denied*, 413 U. S. 923, 93 S. Ct. 3054, 37 L. Ed. 2d 1044 (1973); *Tasby* v. *Estes*, ____ F. Supp. ____ (No. CA-3-4211-C, N.D. Tex., filed March 10, 1976), earlier opinions, 517 F. 2d 92 (5th Cir. 1975), *cert. denied*, 423 U. S. 939, 96 S. Ct. 299, 46 L.Ed. 2d 271 (1975), 342 F. Supp. 945 (N.D. Tex. 1971). We have found no case invalidating such exemption. JET, by the way, would involve similar exemption.

Also presumably exempt from being bused are whites in schools more than 35 or 40 percent black and blacks in schools more than 87.5 or 88 percent white.

Assuming that the district judge was obligated to accept JET should it be constitutionally sufficient,[2] the judge properly rejected JET, as originally formulated,[3] because it provides only for part-time desegregation." JET provided that elementary pupils would spend "at least one hour" at their undesegregated neighborhood school, then each class with its teacher, would board a speaker-equipped bus for continued instruction and transportation to an assigned "away" school, spend three and one-half to four hours at the "away" school for instruction and lunch, and then return by bus to the neighborhood school. Middle and high school pupils would similarly be transported to assigned "away" schools for "four periods of instruction and lunch," but they would be assigned as individuals, rather than by classrooms. JET unfortunately fails to convert

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[2]Because we hold that JET was constitutionally insufficient, we may assume that the district judge would have been obligated to accept it had it been constitutionally sufficient, as the less far-reaching of the two boards' proposals, just as he would be obligated to accept a constitutionally sufficient plan of the only board submitting a plan. *See Morgan* v. *Kerrigan*, 530 F. 2d 401, 409 (1st Cir. 1976); *Davis* v. *School Dist.*, 443 F. 2d 573, 577 (6th Cir.), *cert. denied*, 404 U. S. 913, 92 S. Ct. 233, 30 L.Ed. 2d 186 (1971); *Robinson* v. *Shelby County Bd. of Educ.*, 442 F. 2d 255, 258 (6th Cir. 1971); *Mapp* v. *Board of Educ.*, 329 F. Supp. 1374, 1383 (E.D. Tenn. 1971), *aff'd.*, 477 F. 2d 851 (6th Cir.) (en banc), *cert. denied*, 414 U. S. 1022, 94 S. Ct. 445, 38 L.Ed. 2d 313 (1973).

[3]On July 30, 1975, the day the district judge promulgated his desegregation plan, JCBE submitted a "supplement" to JET, originally filed April 30, 1975. The supplement would eliminate most of the "part-time" aspects of the original JET.

> "Children who will be transported to any away schools will no longer receive any instruction at their home school but will simply board a JET bus at their home school with their teacher or a monitor and then proceed to the away school for the remainder of the school day." Appendix 192.

We need not decide, however, whether JET, as revised in the supplement, would be constitutionally sufficient, because the supplement was filed simultaneously with the promulgation of the district court plan and, thus, too late for the court to consider in reference to its plan.

schools in a school system, found to be *de jure* segregated, from "a white school [or] a 'Negro' school, [to] just schools," *Green* v. *County School Bd.*, 391 U. S. 430, 442, 88 S. Ct. 1689, 20 L. Ed. 2d 716, (1968). The Tenth Circuit in *Keyes* v. *School District No. 1*, 521 F. 2d 465, 475-479 (10th Cir. 1975), *cert. denied.* ____ U. S. ____ 96 S. Ct. 806, ____ L. Ed. 2d ____ (1976), found a similar court-adopted "half-day" plan to be constitutionally insufficient.

> "The claimed advantage of the court's part time desegregation program over the same program run full time is continuous neighborhood contact with school facilities. Part-time pairing offers easier access to school inasmuch as each student would attend his neighborhood school for at least a portion of every day. The neighborhood school arguably would remain viable as an afterschool playground and as the focus for extracurricular and parent activity. Although we acknowledge such neighborhood contact to be important, we cannot place it above the constitutional rights of children to attend desegregated schools. We perceive those rights to include full-time attendance in a desegregated setting." 521 F. 2d at 478.

See *Morgan* v. *Kerrigan*, 530 F. 2d 401, 410 (1st Cir. 1976); *Brinkman* v. *Gilligan*, 518 F. 2d 853 (6th Cir. 1975); *Tasby* v. *Estes*, 517 F. 2d 92, 104 (5th Cir.), *cert. denied*, 423 U. S. 939, 96 S. Ct. 299, 46 L. Ed. 2d 271 (1975); *United States* v. *Texas Educ. Ass'n.*, 467 F. 2d 848, 872-873 (5th Cir. 1972); *United States* v. *Board of Educ.*, 431 F. 2d 59, 61 (5th Cir. 1970); *Dowell* v. *Board of Educ.*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd.*, 465 F. 2d 1012 (10th Cir.) *cert. denied*, 409 U. S. 1041, 93 S. Ct. 526, 34 L. Ed. 2d 490 (1972).

Since JCBE failed to propose a constitutionally sufficient desegregation plan, "the scope of a district court's equitable powers to remedy past wrongs [was] broad, for

breath and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U. S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554, 566 (1971). The plan adopted was "well within [the district judge's] judicial discretion." *Kelly* v. *Metropolitan County Bd. of Educ.*, 463 F. 2d 732, 746 (6th Cir. 1972), *cert. denied*, 409 U. S. 1001, 93 S. Ct. 322, 34 L. Ed. 2d 262 (1973).

We reject JCBE's claim that the district judge promulgated an "excessive" remedy by formulating a county-wide desegregation plan. JCBE claims that the finding of *de jure* segregation in Louisville-Jefferson County was limited to three of 103 schools in the former Jefferson County school system, but admits that approximately 85 per cent of the 61 schools in the former Louisville school system were "racially identifiable" in a system which had "formerly practiced segregation by law." In *Keyes, supra*, 521 F. 2d 465, the Tenth Circuit sustained a district court's adoption of a system-wide desegregation plan even though the *de jure* segregation was limited to "a single corner of the school district."

> "Whether a school system is illegally segregated by reason of statutory separation of the races or by reason of past segregative acts of school authorities, the scope of the remedy must in either case be system-wide. . . .
>
> "[T]he School Board urges us to adopt special remedial standards for cases of non-statutory *de jure* segregation and to limit the remedy to direct results of the Board's segregative acts in Park Hill. We believe the Board's suggestion would saddle the plaintiffs, in the remedy phase of their case, with the burden of proving *de jure* segregation as to each and every school in the system. The [Supreme] Court's opinion in *Keyes* (413 U. S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548) plainly forbids us from requiring as much. The dis-

trict court therefore properly dealt with the entire Denver system in fashioning its remedy." 521 F. 2d at 476-477.

Had the district judge imposed "inflexible" racial ratios in the desegregation plan, such imposition would have been an abuse of his discretion. But we agree with plaintiffs and LBE that the district judge permissibly used the system, racial composition as "a starting point in the process of shaping a remedy." *Swann, supra,* 402 U. S. at 25, 91 S. Ct. at ____, 28 L. Ed. 2d at 571; *Brinkman* v. *Gilligan,* ____ F. 2d ____ (No. 76-1854, 6th Cir., filed July 26, 1976). That the plan will leave no school with a black majority is permissible. See *United States* v. *School Dist.,* 521 F. 2d 530, 547 (8th Cir.), *cert denied,* ____ U. S. ____, 96 S. Ct. 361, ____ L. Ed. 2d ____ (1975) (maximum permissible percentage of blacks in individual school 35 percent in 20 percent black Omaha school system).

Admittedly, the plan requires that, of those black and white pupils to be bused,[4] black pupils be bused much more, eight or nine years, than white pupils, one or two years. But the black plaintiffs have not complained of being unnecessarily burdened in the desegregation process. Cf. *Kelley, supra,* 463 F. 2d at 746, 751; *Keyes, supra,* 521 F. 2d at 479; *Arvizu* v. *Waco Independent School Dist.,* 495 F. 2d 499, 504-508 (5th Cir. 1974). JCBE's complaining that the plan unnecessarily burdens blacks in general, certain blacks in particular, and certain whites in particular, seems odd in light of its admission in submitting JET that "the frequency of involvement in JET at the middle school level will again vary somewhat between pupils both of a different race and of pupils of the same race." Appendix 132.

JCBE, however, correctly asserts that the desegregation plan, if contemplating year-to-year realignment to bring the

[4]See footnote 1, *supra.*

schools back within the racial guidelines, would be improper. If the district judge, by providing that all schools "will have" certain racial percentages and observing that there would be "maintain[ed] a limited range of acceptable racial ratios in individual schools" contemplated year-to-year realignment to correct non-state action-caused divergencies from the racial guidelines, such obiter dictum did not accurately state the law. *Pasadena City Bd. of Educ.* v. *Spangler,* ____ U. S. ____, ____ S. Ct. ____, ____ L. Ed. 2d ____, 44 U.S.L.W. 5114, 5116-5117 (June 28, 1976); *Swann, supra,* 402 U. S. at 31-32, 91 S. Ct. at 1283-1284, 28 L. Ed. 2d at 575-576; *Brinkman, supra,* ____ F. 2d at ____ (No. 76-1854, 6th Cir., filed July 26, 1976).

Attorneys' Fees (No. 76-1413)

JCBE claims that the attorneys' fees award violates the Eleventh Amendment as being, in effect, "an involuntary federal court assessment" against the state treasury.[5] We view the Eleventh Amendment as being no bar because JCBE is an unprotected county agency, rather than the protected "state;" even were JCBE the state, the award of attorneys' fees under 20 U.S.C. § 1617 (Supp. 1974), enacted through section five of the Fourteenth Amendment, would be permissible. *Fitzpatrick* v. *Bitzer,* ____ U. S. ____, ____ S. Ct. ____, ____ L. Ed. 2d ____, 44 U.S.L.W. 5120 (June 28, 1976)

Though holding that attorneys' fees cannot be recovered against states, see *Taylor* v. *Perini,* 503 F. 2d 899, 901 (6th

[5]In district court, JCBE urged three additional grounds in opposition to plaintiffs attorneys' request for fees. JCBE's appellate brief, however, deals almost exclusively with the Eleventh Amendment claim, rather than claims of insufficient documentation of the fees, unreasonable fees, and "double" governmental payment for the underlying legal services in that at least one plaintiffs' attorney is a commonwealth employee. At oral argument, JCBE counsel admitted that he was relying solely on the Eleventh Amendment claim.

Cir. 1974), *vacated on other grounds*, 421 U. S. 982, 95 S. Ct. 1985, 44 L. Ed. 2d 474 (1975), *Jordon* v. *Gilligan*, 500 F. 2d 701 (6th Cir. 1974), *cert. denied*, 421 U. S. 991, 95 S. Ct. 1996, 44 L. Ed. 2d 481 (1975), this court has found no Eleventh Amendment bar to an award against county funds. *Singer* v. *Mahoning County Bd. of Mental Retardation*, 519 F. 2d 748 (6th Cir. 1975); *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281, 287 (6th Cir. 1974). Thus, the Eleventh Amendment is no bar to the attorneys' fee award if we accept plaintiffs' claim that JCBE is neither the "state" nor its "alter ego." *Adams* v. *Rankin County Bd. of Educ.*, 524 F. 2d 928 (5th Cir. 1975); *Singer, supra; Burt* v. *Board of Trustees*, 521 F. 2d 1201, 1205 (4th Cir. 1975); *Hutchison* v. *Lake Oswego School Dist. No. 7*, 519 F. 2d 961 (9th Cir. 1975); *Morris* v. *Board of Educ.*, 401 F. Supp. 188, 203-205 (D. Del. 1975); *King* v. *Caesar Rodney School Dist.*, 396 F. Supp. 423, 425-427 (D. Del. 1975). We agree with plaintiffs. JCBE, "a body politic and corporate with perpetual succession," *inter alia*, may sue and be sued, contract, purchase, receive, hold and sell property, and issue bonds (Ky. Rev. Stat. 160.160), *Lake Oswego, supra, Caesar Rodney, supra*, 396 F. Supp. at 426, cf. *Fitzpatrick, supra*, 519 F. 2d 559, 565 (2d Cir. 1975), *aff'd in part, rev'd in part*, ___ U. S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___, 44 U.S.L.W. 5120 (June 28, 1976), establish curriculum and employment standards (Ky. Rev. Stat. 160.290), *Morris, supra*, 401 F. Supp. at 204, *Caesar Rodney, supra*, and, most importantly, levy school taxes through the county fiscal court (Ky. Rev. Stat. 160.460, 160.470, 160.475, 160.476, 160.593), *Rankin County, supra, Lake Oswego, supra, Morris, supra*, 401 F. Supp. at 204-205, *Caesar Rodney, supra*, cf. *Fitzpatrick, supra*.

Anchorage Dismissal (No. 76-1414)

Plaintiffs contend that the district court erred in dismissing intervening defendant Anchorage independent School District (AISD) because AISD, having been "created and maintained solely for members of one race," constitutes an impermissible "vestige of state-imposed segregation." Plaintiffs claim that the district court should order AISD reincorporated into the Jefferson County school system and its desegregation plan. We disagree.

As established by stipulation, AISD was created in 1911 pursuant to state statute providing for the creation of independent "white" school districts (Act of July 6, 1893, as amended by Act of May 26, 1897, Kentucky Statutes § 4464), and presently has only one black in its school.[6] Because *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), invalidated the racial restriction of the creating statute, the school district would, in conformity with the state severability statute, Ky. Rev. Stat. 446.090, remain in effect for "children," rather than for "white children."

Plaintiffs have stipulated that "[n]o student has ever been excluded from the Anchorage School because of race." *Hiett* v. *Biondi*, 389 F. Supp. 1132, 1134 (N.D. Tex. 1975). Cf. *Tasby* v. *Estes*, ___ F. Supp. ___ (No. CA 3-4211-C, N.D. Tex., filed December 11, 1975). Nor is there evidence that AISD committed other racial segregatory practices, such as sending blacks to neighboring school systems or receiving whites from blacker neighboring school systems. See *Milliken* v. *Bradley*, 418 U. S. 717, 746-747, 94 S. Ct. 3112, 3128, 41 L. Ed. 2d 1069 (1974); *Tasby, supra*. Similarly, there is no evidence that the AISD boundaries were

[6]The stipulated facts indicate that AISD operates one school providing education for pupils from kindergarten through the ninth grade. In the present enrollment of 305 pupils, there are one black, one Vietnamese and one "Oriental (Asian American)."

drawn in 1911 to include whites and exclude blacks. *Biondi, supra,* 389 F. Supp. at 1133. See *Milliken, supra,* 418 U. S. at 745, 746, 94 S. Ct. at 3127, 3128, 41 L. Ed. 2d at ——; *United States* v. *State of Missouri,* 515 F. 2d 1365, 1369 (8th Cir. 1975); *Haney* v. *County Bd. of Educ.,* 410 F. 2d 920 (8th Cir. 1969); *United States* v. *State of Texas,* 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd,* 447 F. 2d 441 (5th Cir. 1971), *cert. denied sub nom., Edgar* v. *United States,* 404 U. S. 1016, 92 S. Ct. 675, 30 L. Ed. 2d 663 (1972). Without evidence of a "constitutional violation within [AISD] that produces a significant segregative effect in another district." *Milliken, supra,* 418 U. S. at 745, 94 S. Ct. at 3127, 41 L. Ed. 2d at ——, there can be no constitutionally required inter-district remedy involving AISD and Jefferson County.

We agree with the district court in "specifically reject[ing] . . . the argument that as a matter of law the very existence of an independent school district created under the predecessor to KRS 160.020 indicates that that system must of necessity be a 'vestige of state-imposed segregation.'"

Civil Rights (No. 75-2032)

We also affirm the dismissal of two white pupils' complaint for failing to state a claim. Fed. R. Civ. P. 12(b)(6). In their complaint, filed twenty days after the district judge announced his desegregation plan, they challenged the plan as violating the Equal Educational Opportunity Act of 1974 (EEOA), 20 U.S.C. §§ 1701-1758, the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-1-2000-9, especially 2000C-6(a), and the equal protection clause, and secondarily, as being an excessive remedy. We have considered the pupils' claim that the plan was excessive and relied too heavily on "inflexible" racial ratios in connection with JCBE's appeal, No. 75-2188, *supra.*

The desegregation plan was specifically designed to eliminate vestiges of state-imposed segregation, *to wit,* "to enforce fully the . . . fourteenth amendment," rather than to racially balance the schools. Thus, the Civil Rights Act is no bar to assigning pupils to schools on racial bases to remove "vestiges of state-imposed segregation." *See, e.g., McDaniel* v. *Barresi,* 402 U. S. 39, 91 S. Ct. 1287, 28 L. Ed. 2d 582 (1971); *Monroe* v. *Board of Commissioners,* 427 F. 2d 1005, 1009 (6th Cir. 1970); *United States* v. *School Dist. No. 151,* 404 F. 2d 1125, 1130 (7th Cir. 1968); *Clark* v. *Board of Directors,* 328 F. Supp. 1205, 1212 (E.D. Ark. 1971); *Harvest* v. *Board of Public Instruction,* 312 F. Supp. 269, 272-274 (M.D. Fla. 1970). Nor does the equal protection clause preclude such "race consciousness." *See, e.g., Barresi, supra; North Carolina State Bd. of Educ.* v. *Swann,* 402 U. S. 43, 46, 91 S. Ct. 1284, 1286, 28 L. Ed. 2d 586, 589 (1971); *Clark, supra.*

Assuming that pupils ordered to be bused may raise EEOA claims, EEOA section 1702(b) specifically exempts desegregation plans designed "to enforce fully the . . . fourteenth amendment." *Newburg Area Council, Inc.* v. *Gordon,* 521 F. 2d 578, 581 (6th Cir. 1975); *Brinkman* v. *Gilligan,* 518 F. 2d 853, 856 (6th Cir. 1975).

Moreover, the district judge explicitly complied with the "priority of remedies" (EEOA Sections 1713, 1755) in determining the necessity of busing. Accord, *United States* v. *Texas Education Agency,* 532 F. 2d 380, 394 n. 18 (5th Cir. 1976); *Kerrigan, supra,* 530 F. 2d at 411-415. The district judge, "scrupulously attempt[ing] to follow" the priority of remedies, specifically found

> "that section [1713] dealing with the priority of remedies has been considered and followed by this Court to the best of its ability and the priorities therein delineated have been meticulously followed as well as the other [EEOA] provisions . . . ."

Noteworthily, though otherwise challenging the court imposed desegregation plan, *supra,* JCBE conceded at oral argument that some busing was necessary "as a last resort," to eliminate state-imposed vestiges of segregation.

Affirmed.

McCree, Circuit Judge (concurring in part and dissenting in part). I concur in the majority opinion except with respect to its affirmance of the dismissal of the action against Anchorage Independent School District in No. 76-1414. I do not agree with its approval of the district courts determination that "there is no evidence that the AISD boundaries were drawn in 1911 to include whites and to exclude blacks."

Appellants argue that *as a matter of* (state) *law* a black child residing within the City of Anchorage (i.e. within the geographic boundaries of the district) would *not* have been considered as residing in the Anchorage *white* common graded school district. Instead, they would have been residents of the Jefferson County School District, which maintained both white and colored schools. *Raley* v. *County Board of Ed.,* 224 Ky. 50, 5 S. W. 484, 486 (1928), *Webster County Bd. of Ed.* v. *Sebree,* 202 Ky. 589, 260 S. W. 288 (1924). Accordingly, appellants assert that no black children "resided" in the Anchorage School District, and that any black child living in Anchorage who may have applied for admission to its school would have been rejected, not because of his race *per se,* but because he did not (and legally could not) reside within the district.

Nothing in the parties' stipulation is inconsistent with appellants' contention that the Anchorage district "boundaries" were drawn in 1911 to exclude blacks not geographically, but by definition. The district was created *de jure* by state imposed segregation in violation of the Federal Constitution. If, as appellants contend, the district never lost its segregated character, the district court's dismissal

was improper. I cannot agree that the stipulated fact that at present the student body includes one black, one Vietnamese, and one "Oriental (Asian American)" demonstrates as a matter of state law that all vestiges of state imposed discrimination have been removed. Both the Louisville and Jefferson County school districts have within their student populations substantially larger percentages of members of formerly excluded racial groups than does the Anchorage district. Nevertheless, in addition to merely eliminating the racial designations of their schools, both Louisville and Jefferson County are required by law to remove *all* vestiges of unlawful segregation. Anchorage should not be required to do less. Accordingly, I would remand the case to the district court for a determination whether all vestiges of the district's segregated existence have been removed.

ORDER DENYING MOTION FOR STAY

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 75-1737

NEWBURG AREA COUNCIL, INC. et al. - - - - - -

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - - - -

JOHN E. HAYCRAFT, et al. -

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - - - -

APPLICATION FOR STAY OF ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Before: PHILLIPS, Chief Judge, MCCREE and MILLER, Circuit Judges. Per Curiam.

In these actions this Court by its per curiam opinion of July 17, 1975, directed:

> That a writ of mandamus issue directing the respondent to approve a plan for the desegregation of the newly-created Jefferson County, Kentucky school district to the end that all remaining vestiges of state-imposed segregation shall be removed from the said school district (formerly the Jefferson County and Louisville school districts). The said order of approval of such plan shall specifically provide that the plan shall take effect at the beginning of the 1975-76 academic year. Any further hearings which the district judge may find to be necessary shall be fixed on such dates as he shall deem proper, but in no event shall such hearing or hearings be permitted to delay the implementation of the court-approved desegregation plan beyond the beginning date of the next ensuing school year.

In response to the said writ of mandamus, the respondent, the Honorable James F. Gordon, United States District Judge for the Western District of Kentucky, entered judgment on July 30, 1975, including findings of fact and conclusions of law of the same date, approving a plan for the desegregation of the schools of the newly created Jefferson County, Kentucky school district, to take effect on September 4, 1975, the beginning date of the 1975-76 academic year.

On August 18, 1975, we were presented with the motion of the Board of Education of Jefferson County, Kentucky, for a stay of that portion of the order and judgment of the district court, dated July 30, 1975, which requires the transportation of pupils from the district or "home" school created by the plan to a school outside the home district or an "away" school, pending appeal to this Court. Such motion for a stay pending appeal is made pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

Objections in opposition to the said motion for a stay have been presented by former members of the Board of Education of Louisville, Kentucky.

As pointed out in our per curiam opinion of July 17, 1975, "to delay or postpone for an additional year the realization by thousands of black students of their established constitutional rights would be a manifest injustice and violative of the Fourteenth Amendment." It was

further pointed out that our first opinion in these cases to the effect that there were remaining vestiges of state-imposed segregation in the Jefferson County and Louisville school districts was rendered on December 28, 1973, and that this holding is now the law of the present case. Consequently, the granting of a stay at this time would have the effect of overruling our recent per curiam opinion of July 17, 1975, which emphasized the necessity that any plan to remove remaining vestiges of state-imposed segregation should take effect at the beginning of the 1975-76 school year. Further, it is apparent from the motion for a stay that it not only flies in the face of our recent per curiam opinion that a plan for desegregation for Jefferson County, Kentucky, should not be delayed beyond the upcoming school year, but, for the most part, it challenges substantive features of the plan which has been approved by the district court, thus presenting issues which are more appropriate for consideration by the Court in due course on appeal and not on an application for a stay.

After full consideration of the entire record, we are of the opinion that the motion of the Board of Education of Jefferson County, Kentucky, for a stay of the desegregation plan approved by the district court, is without merit, and that such motion should be and it is hereby denied.

LETTER TO COUNSEL ACKNOWLEDGING DENIAL BY U.S. SUPREME COURT OF MOTION FOR STAY

August 29, 1975

John A. Fulton, Esquire
Counselor at law
Suite 1805-29 Kentucky Home Life Building
Louisville, Ky. 40202

RE: Bd. of Education of Jefferson County
et al. v. Newburg Area Council, Inc.
et al., No. A-172

Dear Mr. Fulton:

Your application for stay in the above-entitled case was presented to Mr. Justice Blackmun and Mr. Justice Powell who, have endorsed thereon the following:

"Application for stay is denied. Harry A. Blackmun, Associate Justice, August 28, 1975."
"Denied. L.F.P., Jr., 8/29/75."

Very truly yours,

Michael Rodak, Jr., Clerk
By: (s) Paul L. Jones
Assistant Clerk

erl

cc: Henry A. Triplett, Esq.
231 South Fifth St., Third Floor
Louisville, Ky. 40202

John G. O'Mara, Esq.
607 W. Ormsby
Louisville, Ky. 40202

Robert Allen Sedler, Esq.
Box 862, University Station
Lexington, Ky. 40506

Supreme Court, U. S.
FILED
DEC 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-10

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST - - - - - Respondents

AND

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY and BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - Petitioners

versus

JOHN E. HAYCRAFT and HAZEL K. LANE - - - - - Respondents

L. J. HOLLENBACH, III, County Judge - Intervenor

(Other parties respondent on inside cover)

BRIEF IN OPPOSITION BY FIVE FORMER MEMBERS OF THE BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY

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Attorneys for Repondents, Five former members of the Board of Education of Louisville, Kentucky

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

Additional Respondents in Board of Education v. Newburg:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County and Board of Education of Louisville versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

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IN THE

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October Term, 1976

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BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and
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v.

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SARAH WHITE,
JOHNIE WRIGHT and
SUZANNE POST - - - - - *Respondents*

AND

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY and
BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - - - *Petitioners*

v.

JOHN E. HAYCRAFT and
HAZEL K. LANE - - - - *Respondents*

L. J. HOLLENBACH, III, County Judge - *Intervenor*

(Other parties respondent on inside cover)

BRIEF IN OPPOSITION BY FIVE FORMER MEMBERS OF THE BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY

QUESTION PRESENTED

Where a United States District Court orders a school desegregation plan and such plan takes into consideration among other things, demographic data, racial ratios of students and teachers and all other school personnnel and provides for an escape-proof student assignment methodology, provides for uniformity of treatment within classes and is designed to remove all vestiges of a dual school system and takes into consideration the Equal Educational Opportunities Act of 1974 and where such plan contains attributes of equity is such a plan within the equitable and remedial powers of a Court charged with removing all vestiges of a dual school system?

These respondents, the five former members of the Board of Education of Louisville, Kentucky and presently members of the Board of Education of Jefferson County, Kentucky, respectfully contend the answer is in the affirmative.

STATEMENT OF THE CASE

The petition filed herein seeks to certify the correctness of the judgment made by the United States Court of Appeals for the Sixth Circuit in *Cunningham* v. *Grayson,* 541 F. 2d 538 (1976) wherein the Circuit Court affirmed the District Court's formulation of a school desegregation remedy. The respondents here are the former members of the Board of Education of Louisville, Kentucky, who have beeen expressly permitted by resolution and order to oppose this petition.

Cunningham v. *Grayson, supra,* pp. 539, 540 and Appendix to Petition for Writ of Certiorari, pp. 91, 92, 93. The petitioners are the Board of Education of Jefferson County, Kentucky and Ernest Grayson, its superintendent. Since this protracted litigation commenced, a merger between the Board of Education of Jefferson County, Kentucky and the Board of Education of Louisville, Kentucky has occurred, and became effective April 1, 1975. *Cunningham* v. *Grayson, supra,* and *Board of Education of Louisville, Kentucky* v. *Board of Education of Jefferson County, Kentucky,* Ky., 522 S. W. 2d 854.

On June 30, 1975, the Hon. James Gordon, Judge of the United States District Court for the Western District of Kentucky, entered a judgment approving a plan to desegregate the public schools of Jefferson County, Kentucky.

The litigation leading to the adoption of this plan was as heated and bitterly fought as any part of the case. The plan adopted by the United States District Court and approved by the Sixth Circuit in *Cunningham* v. *Grayson, supra,* is found on pages 50-90 of the Appendix filed by the petitioners herein.

These respondents have attached as an Appendix to this Brief in Opposition a chronology of events in this litigation. This Court will remember that in *Board of Education of Louisville, et al.* v. *James E. Haycraft, et al.,* S. Ct. of the U. S., October Term, 1974, 74-1123, 418 U. S. 918, we asked this Court (p. 28 of Petition for Writ of Certiorari) to find the Louisville school system to be a unitary distri t or order an interdistrict

or county-wide remedy. The reasons for this request were obvious. The black/white student ratio of Louisville was approximately 50/50 and that of Jefferson County school district approximately 94% white and 6% black. Geographically, the Louisville district was much smaller than the Jefferson County district. If there had been a desegregation order directed to Louisville alone, then massive white flight would have followed and the Louisville district would have become blacker and unfortunately and regretably poorer. As the boundaries of the Louisville school district were substantially coterminous, but not entirely, with the boundaries of the City of Louisville, we were arguing for the City of Louisville as well as the Louisville school district.

After certiorari was granted by this Court and the case was remanded to the Sixth Circuit for further consideration in view of the Detroit case, *Milliken* v. *Bradley*, 418 U. S. 717, and after the Sixth Circuit reaffirmed its original holding, *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (CA 6, 1974), the Louisville School Board petitioned the State Board of Education for the Commonwealth of Kentucky for an order merging it with the Jefferson County school district. The petition was granted. Another petition for certiorari was filed in this Court and Louisville joined in it for protective purposes. This petition was denied. 44 L. ed. 2d 88. Louisville represented that a merger had occurred and because this eliminated the argument about an interdistrict remedy present in Detroit and present in this litigation, the writ was de-

nied and we suspect as a result of the merger development.

Thereafter the District Court was ordered by the United States Court of Appeals for the Sixth Circuit to formulate a plan for the 1975-76 school year. The District Court performed this task fairly and in good spirit. After the plan was adopted and ordered, the petitioners here, Board of Education of Jefferson County, Kentucky, sought a stay from the Sixth Circuit and also sought one from this Court. The stays were resisted by the five former members of the Louisville school district in accord with the resolution and court order permitting a response to be filed. Thereafter, Jefferson appealed again to the United States Court of Appeals for the Sixth Circuit and argued that Judge Gordon's plan was too extreme and further argued the merits of JET, all of which the Sixth Circuit rejected and Judge Gordon's plan in every respect was affirmed in *Cunningham* v. *Grayson, supra.*

It is the position of the five former members of the Board of Education of Louisville, Kentucky that the desegregation plan formulated by Judge Gordon and approved by the Sixth Circuit is a model plan and free from any constitutional infirmity and well within the discretion of a federal court.

Although on the surface the plan falls more heavily upon the black students than on the white students, the original plaintiffs concur that the plan is a good one and is as fair as one can be. After the merger between Louisville and Jefferson, the approximate ratio of white to black was 80/20. The average white child is

transported two of the twelve public school years, whereas the average black child is bused ten of the twelve years. All schools are involved and the racial identity of each school is removed. There is no contention that any geographic or physical obstacle justifies exclusion of any school.

As we understand the petition filed here, the claim is that the District Court should have adopted a lesser remedy and as a matter of law should have adopted Plan JET which was advocated by the petitioners herein.

It should be observed that the plan adopted by the District Court and approved by the Sixth Circuit was considereably closer in import to the plan originally advocated by Louisville than was Plan JET originally or as modified. The infirmity found by the District Court in Louisville's plan was that it was too inflexible and provided for exact ratios which reflected the system-wide ratio.

These respondents adopt as part of this response the opinion in *Cunningham* v. *Grayson, supra,* by reference to it.

Hopefully, it may be demonstrated by this Brief in Opposition that petitioners' position is devoid of any meritorious reasons for granting a writ of certiorari. Hopefully, too, such action denying the writ will signal the end of this protracted litigation and encourage petitioner to get about the business of educating children which, of course, is its sole reason for existence.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners claim that the two Federal Courts have rejected a constitutionally sufficient plan and that both Courts approved fixed ratios in each school contrary to the previous decisions of this Court. It is tempting to use a sledge hammer for the purpose of killing a gnat.

We would first remind this Court that the Sixth Circuit did not find revised Plan JET constitutional. *Cunningham* v. *Grayson, supra,* at page 541, Footnote 3. Second, we would observe that the Sixth Circuit found the original JET plan constitutionally insufficient. *Cunningham* v. *Grayson, supra,* page 540, Footnote 2. Third, the Sixth Circuit found the plan adopted by Judge Gordon constitutional. So, we are really not dealing with a case where a lower court has found two plans to be constitutionally sufficient and adopted the more far reaching plan as between the two. Nor are we convinced as somewhat implied by the Sixth Circuit that the Court would be required as a matter of law to adopt the less far reaching plan. We say this because there are predictable factors in each desegregation plan. First, we know there is going to be a certain decrease in the overall school population and this generally results from white children leaving the system. Thus, if you adopt a minimum plan at the start without taking into account this known fact, at the end of your first year you are again confronted with a constitutionally insufficient plan with a resulting resegregated school system. Of all people, Louisville understands

this lesson best because its original plan in 1956 did not do the job and permitted resegregation. In fairness to Louisville, the law at that time would probably not have permitted as extensive a plan as in issue here. It must be remembered that the test of which plan is best is really not the one which is less far reaching but rather the one which promises to be effective and to work now and which promises to bar future discrimination. *Green* v. *County School Board of New Kent Co.*, 391 U. S. 430 (1968). The duty here is to eliminate all vestiges of state imposed segregation from the school system not merely to desegregate schools. *Keyes* v. *School District #1*, 413 U. S. 189 (1973).

Petitioners claim that the Court required fixed percentages of black and white in each school. First, we would observe the Court required no such thing. Second, we would point out that the Court made very limited use of ratios as a starting point as permitted by *Swann* v. *Charlotte-Mecklenberg Bd. of Ed.*, 402 U. S. 1, 28 L. Ed. 2554, 91 S. Ct. 1267 (1971). We quote from *Swann:*

> "The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."
>
> "We see therefore that the use made of the mathematical ratios was not more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the district court proceeded to frame a degree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in Green, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court."

Because we think the Sixth Circuit so adequately dispatched this argument, we quote from a part of the opinion in *Cunningham* v. *Grayson, supra:*

> "Had the district judge imposed 'inflexible' racial ratios in the desegregation plan, such imposition would have been an abuse of his discretion. But we agree with plaintiffs and LBE that the district judge permissibly used the system, racial composition as 'a starting point in the process of shaping a remedy.' *Swann, supra,* 402 U. S. at 25, 91 S. Ct. at 1280, 28 L. Ed. 2d at 571; *Brinkman* v. *Gilligan,* 539 F. 2d 1084 (6th Cir., filed July 26, 1976). That the plan will leave no school with a black majority is permissible. See *United States* v. *School Dis.,* 521 F. 2d 530, 547 (8th Cir.), *cert. denied,* 423 U. S. 946, 96 S. Ct. 361, 46 L. Ed. 2d 280 (1975) (Maximum permissible percentage of blacks in individual school 35 percent in 20 percent black Omaha school system)."
>
> "Admittedly, the plan requires that, of those black and white pupils to be bused, black pupils be

bused much more, eight or nine years, than white pupils, one or two years. But the black plaintiffs have not complained of being unnecessarily burdened in the desegregation process. Cf. *Kelley, supra,* 463 F. 2d at 746, 751; *Keyes, supra,* 521 F. 2d at 479; *Arvizu* v. *Waco Independent School Dist.,* 495 F. 2d 499, 504-508 (5th Cir. 1974). JCBE's complaining that the plan unnecessarily burdens blacks in general, certain blacks in particular, and certain whites in particular, seems odd in light of its admission in submitting JET that 'the frequency of involvement in JET at the middle school level will again vary somewhat between pupils both of a different race and of pupils of the same race.' Appendix 132."

Petitioners cite *Pasadena City Board of Education* v. *Spangler,* —— U. S. ——, 96 S. Ct. 2697 (1976), although why is not clear. The *Pasadena* desegregation plan provided that there would never be a school "with a majority of any minority students" and the District Court retained jurisdiction to make certain this did not occur. There seems to be no argument that the District Court in *Pasadena* had a right to do this as a starting point as permitted by *Swann, supra.* The argument, of course, is whether such an order can be a "life sentence." This Court held that it could not because there might be factors beyond the school board's control which would cause this original status or requirement to change and such factors would not amount to de jure segregation. It is interesting that this argument somewhat supports Louisville's orignial contention that if Louisville and Jefferson were guilty

of de jure segregation then the remedy must be county-wide. Surely if the remedy would have been directed to Louisville alone and all the whites would have then fled to the suburbs or Indiana or other counties, then the Federal Courts would have been powerless to eliminate an all black system in Louisville alone. We suppose also there is no particular contention that the District Court here or in Pasadena did not have the power to insist upon compliance with its original plan and order. We have not read anywhere that the District Court here could order a plan which would eliminate the vestiges of a dual school system and be powerless to insist upon compliance with the plan again as a starting point. There is apparently no problem about a District Court dealing with resegregation, as is proved by the history of this case. Each case is different. Respondents here have no difficulty in seeing that if a certain school in *Pasadena* finds itself with a majority of minority students that this school could be considered a desegregated school and one that lacks racial identity. The District Court here was dealing with an "x" number of white children, a "y" number of black children, and a "z" number of schools. Using this very appropriate information and armed with extensive demographic data with which the Court was inundated in protracted previous trials, it is our contention that the order formulated was well within the broad discretion given a District Court by *Swann.* This plan took into consideration the real factor of white flight and also recognized that a remedy which falls equally upon all within a class is likely to endure and

cause less resentment. Such a plan has the attributes of equity and uniformity in addition to accomplishing the task for which it was designed. Pasadena is not material to the controversy here and the contention was dealt with quite adequately by the Sixth Circuit in *Cunningham* v. *Grayson, supra,* page 542. And, of course, it must be remembered that the forbidden fruit is not the realignment but a realignment for reasons of nonstate action.

We must comment somewhat on the Appendix attached to the actual petition in this case. At first blush, it might appear that the Court ordered specific ratios of 12%, 17%, 32% and the like in certain schools. This data is likewise found in the Appendix on pages 85-90. On page 55 of the Appendix, it will be noted that the elementary range is 12% through 40% and the secondary range is 12½% through 35%. The Appendix designating the explicit ratios resulted from the establishment of the clusters and is a prediction of what the ratios in each school would be as demonstrating compliance with the Court's order. Those schools found to have ratios within the perameters established by the Court's plan were exempt, pages 57, 58 of Appendix to Petition. These percentages figures should not be understood or be construed as an order by the District Court for a precise ratio in a particular school. The starting point as stated and as shown was 12% through 40% for the elementary schools and 12½% through 35% in the secondary. Thus, an elementary school with 1,000 students could contain as few as 120 black children or as many as 400. If this is an example

of mathematical precision or exact ratio, then the scientific future of this country is in serious trouble.

The use of these starting points insured the elimination of racially identifiable schools. Those cases which have permitted the continued existence of one race schools have had factual situations indigenous to a particular school community. These factors include geographic barriers, great distances, and the like. Nothing like that is present here.

Let us deal with the question of white flight. This Court will remember from the many school desegregation cases it has considered that the theory of white flight or as it is sometimes known, the tip ratio theory, emanated from research done by Professors Pedigrew and Havinghurst. The idea, and it has proved out in almost every city in America, is that when an all white school obtains a black population of 25% to 40%, the school tips, the whites leave and in a short time the school becomes practically all black. The difference between 25% and 40% is accounted for by the prestige of the school, scholastic program, football team, and the like. By providing a county-wide remedy, white flight was effectively eliminated because there was no longer a haven in the suburbs (compare Detroit). By insisting on uniformity within the respective classes, the burden fell equally on those within a particular class. Thus, there is no escape by moving to the suburbs and to "beat the rap," a family would have to move from Jefferson County to another county or across the river to Indiana. Massive racial isolation with attributes of poverty in inner-cities has resulted from middle class whites and above fleeing the inner-city. The plan here

is an unusual one in that it forthrightly dealt with this problem.

Since starting on this brief and response, the Court decided *Austin Independent School District* v. *United States,* #76-200, on December 6, 1976. The case has caused some unrest and has been responsible for some excited utterances. One group says the case has no relevance at all to the matter at hand and the other side contends that it effectively emasculates a District Court's power to provide a complete remedy as was done here. The order of the Court seems to remand for the purpose of determining whether or not there was a violation. The concurring opinion encourages consideration of the remedy in the event the Fifth Circuit adheres to its original holding. The concurring opinion speaks of the elements to be considered in a remedy but apparently the majority order does not. Accordingly, we believe that the case has no relevance whatsoever to the case here. We must assume that the issue of whether or not Louisville and Jefferson were guilty of de jure acts of segregation is over. We have been told this twice by the Sixth Circuit and once by this Court when it denied petitions for certiorari with many of the same contentions discussed in the concurring opinion in *Austin* advanced. The same arguments about the applicability of *Green* v. *County School Board of New Kent Co.,* 391 U. S. 430 (1968) insofar as the holding in *Green* relates to an urban school situation, have been made by Louisville and Jefferson during the practice of this case. Unfortunately, none of the majority desegregation cases decided by the Supreme Court have really dealt with specifics but have expostulated generalities. For example, some argument could be made that *Swann* is like a smorgasbord. There is a little something for everybody and opposite positions can be sustained by certain language. On one hand it says that the Federal Courts are without power to deal with a de facto situation and on the other hand it clearly permits a Federal Court to remedy a resegregation situation where the resegregation resulted from residential patterns. At any rate, we do not believe *Austin* is applicable here because the statements made in the concurring opinion are not endorsed or joined in by five members of the Court. Second, as stated, the issue of guilt, so [redacted] to speak, is over. Third, the only claim relative to the plan which has been in effect since September of 1975 is that it calls for precise ratios and this contention, of course, is defied by the facts and by the terms of the plan.

CONCLUSION

Countless times federal appellate Courts have stated that the District Court is in a far better position to formulate a remedy and only in cases of clear recalcitrance have the higher Courts ordered specific remedies. The District Court here was confronted with a mandate to desegregate the Louisville and Jefferson County school systems. The District Court expressly found, and this was concurred in by the Sixth Circuit, that it could not perform this task within the respective school districts. Hence, the argument about an interdistrict remedy which the Sixth Circuit expressly approved.

The argument was ended after the merger of the two systems. Having been ordered to desegregate the two systems and then faced with the task of eliminating the vestiges of a dual system in the single or merged district and being mindful of this Court's decision in the Denver case, the Court formulated a plan that was simple, escape-proof, equitable, and uniform. The black children upon whom the burden of this remedy fell more heavily have not complained. The vast majority of the children in Jefferson County have endured the remedy with patience, dignity, and good-humor. We are satisfied that a majority of the parents, while resenting perhaps the intrusion and inconvenience, desire the argument to end. Notwithstanding national publicity to the contrary, the violent incidents of protest have been sporadic and a vast majority of the protests have been peaceful and dignified. Comparing Louisville to Boston is like comparing Heaven and Hades. Approximately 20% to 25% of the children are involved in cross-transportation in a given year. The idea behind *Brown I*, as we understand it, was to provide equality of opportunity. In the old Louisville school district, 40% of the familes who had children in public schools were indexed as poverty level with 80% of the 40% being black. Combining racial isolation with poverty is a no-win situation. The respondents here have long been convinced that the only solution and the only guarantee for equality of opportunity is to proliferate these children around the community and allow them to attend schools where there is a higher economic level and more positive peer group influences. Educators know that achievement in school is directly

related to the economic background and status of the child. Opponents sometime confuse this with quality education. This will probably be achieved in the future.

Since this litigation started in 1972, our community has been confronted with a series of long delays and instant deadlines. If there is to be a retreat from *Brown I* and *Swann* and the like, make it a full one and please don't tinker with a fair plan that is working. For this Court to undo the hard work that has been done by the District Court, the Sixth Circuit, the parties, and the community at this stage of the game would be in our judgment unpardonable. So, for the sake of those who have abided by the decision of this Court in good spirit and particularly the children and families who bear this burden, we ask you to let it live or kill it, one of the two, but do it quickly, finally, and irrevocably so that we may get on with the business at hand.

WHEREFORE, the respondents, five former members of the Board of Education of Louisville, Kentucky, respectfully demand that the petition for writ of certiorari be denied and that they recover all other and proper relief in the premises.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1976, three copies of this Brief in Opposition by Five Former Members of the Board of Education of Louisville, Kentucky, were mailed, postage prepaid to: Mr. Thomas Hogan, 701 W. Walnut Street, Louisville, Kentucky, Counsel for Respondent; Mr. John A. Fulton, 1805 Kentucky Home Life Bldg., Louisville, Kentucky, Counsel for Petitioner; and Mr. J. Bruce Miller, 1112 Kentucky Home Life Bldg., Louisville, Kentucky, Counsel for Intervenor.

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APPENDIX

CHRONOLOGY

The following is a chronology of the events of the desegregation litigation involving Louisville and Jefferson County school systems, styled Newburg Area Council, Inc., et al. v. Board of Education of Jefferson County, Kentucky, Civil Actions Nos. 7045 and 7291, United States District Court for the Western District of Kentucky at Louisville.

August 27, 1971	Civil Rights organization and individual plaintiffs filed suit U. S. District Court, asking for desegregation of Jefferson County school system.
June 22, 1972	K.C.L.U. and N.A.A.C.P. filed suit, asking for desegregation of Louisville school system.
June 25, 1972	Kentucky Commission for Human rights intervened, asking merger of two school systems and desegregation of entire area and Anchorage. All actions consolidated in District Court.
October 18, 1972	Anchorage school board dismissed.
December 1, 1972	Extensive trial in District Court.
March 8, 1973	U. S. District Court Judgment, holding neither school system in violation and dismissing Complaint entered. Not reported.
December 28, 1973	U. S. Court of Appeals for the Sixth Circuit reversed the District Court and ordered desegregation plan for all three school districts, Louisville, Jefferson County and Anchorage. Newburg Area Council v. Board of Education of Jef-

ferson County, Kentucky, 489 F. 2d 925 (CA6, 1973).

March 24-28, 1974 — Jefferson County, Louisville and Anchorage school systems sought certiorari in the United States Supreme Court.

April 10-11, 1974 — Louisville and Jefferson County school boards filed joint plan in compliance with District Court Order and Anchorage board filed separate desegregation plan.

May 28, 1974 — Jefferson County Board filed separate desegregation plan.

July 16-19, 1974 — U. S. District Court conducts four-day hearings on desegregation plans, rejects all plans and orders "Plan X" drafted.

July 23, 1974 — U. S. District Court entered Judgment adopting Plan X, providing for the cross-district busing of in excess of 35,000 students and declaring Louisville and Jefferson County systems merged immediately and dismissing Anchorage Board of Education.

July 25, 1974 — U. S. Supreme Court granted certiorari in *Milliken* v. *Bradley* (Detroit case) and in *Newburg and Haycraft* v. *Jefferson County and Louisville Boards* (Louisville case), 418 U. S. 918, District Courts sets aside judgment of 7-23-74.

December 11, 1974 — United States Court of Appeal for the Sixth Circuit, in the light of *Milliken* reinstated its desegregation order and mandate providing that implementation

by the District Court should not be ordered, pending all appeals. *Newburg Area Council, Inc.* v. *Board of Education,* Ky., 510 F. 2d 1358 (CA6, 1974).

January 6, 1975 — Jefferson County Board directed counsel to seek certiorari of Sixth Circuit Court of Appeals' Order of December 11, 1974, in Supreme Court of the United States.

January 30, 1975 — United States District Court directed Jefferson County Board to prepare a desegregation plan in compliance with Equal Educational Opportunities Act of 1974 and current decisions of the Supreme Court, giving other parties opportunities to file plans as well.

April 1, 1975 — Jefferson County school system and the Louisville system merged effective July 1, 1975, under state statutes and by authority of State Superintendent of Education. *Board of Education of Louisville, Kentucky* v. *Board of Education of Jefferson County, Kentucky,* Ky., 522 S. W. 2d 854.

April 21, 1975 — United States Supreme Court denied certiorari in the Jefferson County and Louisville cases. 44 L. Ed. 2d 88.

June 6, 1975 — Pre-trial conference, U. S. District Court, concerning all issues.

June 18, 1975 — United States District Court issues pretrial order setting hearing on all plans and objections thereto for August 4, 1975, declaring intention to comply

	with Congressional Act and Supreme Court decisions.
June 30, 1975	Plaintiffs petitioned U. S. Court of Appeals for writ of mandamus, directing District Judge to proceed to hearing July 14 instead of August 4, 1975, and to implement any order and judgment in the school year, 1975. (CA6) 75-1737.
July 14, 1975	Response of Hon. James F. Gordon, United States District Judge, advising Court of Appeals of pre-trial Order of June 18, evidentiary hearing to be held August 4, 1975, and intention of District Court to carry out the mandate of Court of Appeals to remove all vestiges of state-imposed segregation.
July 17, 1975	Writ of mandamus and per curiam opinion directing District Judge to formulate and implement desegregation plan. 75-1737.
July 30, 1975	Judgment, U. S. District Court, formulating desegregation plan and ordering implementation of same September 4, 1975.
August 18, 1975	Jefferson County Board of Education moved the U. S. Circuit Court of Appeals for partial stay of Judgment and Order of District Judge of July 30, staying the transportation portions of Judgment.
August 21, 1975	United States Court of Appeals, Sixth Circuit denied Jefferson County Board's application for stay of District Court's

	Judgment pending appeal, under Rule 8 F.R.A.P.
August 25, 1975	Jefferson County Board moves individual Justices of the Supreme Court of the United States for order dissolving writ of mandamus issued by United States Court of Appeals and to stay Judgment of July 30, 1975, of District Court implementing desegregation plan of September 4, 1975, which motion for stay was denied by United States Court of Appeals, Sixth Circuit on August 21, 1975. Denied.
August 23, 1976	Sixth Circuit approved Judge Gordon's desegregation plan. *Cunningham* v. *Grayson*, 541 F. 2d 538 (1976).